A.S.V., Inc. a/k/a Terex *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

A.S.V., Inc. a/k/a Terex *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 18–CA–131987, 18–CA–140338, and 18–RC–128308

August 21, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On June 9, 2015, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions, to amend the remedy,[3] and adopt the recommended Order as modified and set forth in full below.

1. The judge correctly found that the Respondent, on multiple occasions, threatened and interrogated employees in relation to two Board-conducted elections held one week apart in the Respondent's paint and assembly departments, in violation of Section 8(a)(1) of the Act.

2. The judge also correctly found that the Respondent permanently laid off 13 employees shortly after the elections in order to prevent the unionization of its work force, in violation of Section 8(a)(3) and (1).[4]

[1] The Respondent, at the time it filed its exceptions, also filed a motion to reopen and supplement the record in order to submit into evidence a collective-bargaining agreement it reached with the Union for the facility's paint unit after the hearing closed. The Respondent's motion asserts that the agreement is relevant to the propriety of the judge's recommended *Gissel* bargaining order for the assembly department unit. We deny this motion because the proffered agreement is not relevant to that remedial issue, as the Board traditionally evaluates the need for a bargaining order based on the situation at the time the unfair labor practices were committed. See *Garvey Marine., Inc.*, 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).

Nevertheless, we recognize that, contrary to the Board's approach, certain courts of appeals have opined that subsequent events are relevant to the appropriateness of a *Gissel* bargaining order. See, e.g., *NLRB v. Cell Agr. Mfg Co.*, 41 F.3d 389, 398–399 (8th Cir. 1994). Even if we considered the proffered agreement, however, it would not affect our conclusion that a remedial bargaining order for the assembly department unit is warranted under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). A collective-bargaining agreement reached in another unit does not minimize or dispel the substantial unremedied hallmark violations, including the numerous 8(a)(1) threats and the many 8(a)(3) permanent layoffs. As the judge noted, these violations provide a powerful and unforgettable object lesson to the assembly department employees in the risks of voting for union representation. Relatedly, we observe that the Respondent's reliance, in its exceptions brief, on assurances it gave employees months later that it would comply with the Act fell far short of an effective repudiation of those violations under the Board's longstanding *Passavant* standards. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. In accordance with *King Soopers, Inc.,* 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). We shall modify the judge's recommended Order in these respects, and we will substitute a new Notice to reflect these remedial changes.

[4] In affirming those violations, we do not rely on the fact, noted by the judge, that the mass employee layoff immediately after the elections was comparable to an earlier layoff in 2012 during a previous union campaign, as the motive for the 2012 layoff was never litigated. We note, however, that given the General Counsel's strong showing of unlawful motivation through other evidence, the Respondent's rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that the mass layoff would have occurred even absent union activity is "substantial." *Alternative Energy Applications*, 361 NLRB 1203, 1207 (2014); accord *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011). Moreover, in order to meet its rebuttal burden, the Respondent was required to establish that it would have done "what it did, when it did." *We Can, Inc.,* 315 NLRB 170, 172 (1994). See also *Manor Care of Easton, PA,* 356 NLRB 202, 224 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); *Dlubak Corp.,* 307 NLRB 1138, 1159 (1992), enfd. 5 F.3d 1488 (3d Cir. 1993); and *Eddyleon Chocolate Co.,* 301 NLRB 887, 890–891 (1991). We agree with the judge that the Respondent did not carry that "substantial" burden here.

Further with respect to the six painters who were permanently laid off, we find the report prepared by Adam Hughes for his superiors recording his meetings with the Respondent's staff admissible under the business-records and residual exceptions to the hearsay rule. See FRE 803(6) and FRE 807. However, we agree with the judge that the report and Hughes's testimony supporting the accuracy of that report, do not convey a dispositive admission by the Respondent. We also agree with the judge that Hughes' report and testimony strengthen his ultimate finding that the Respondent would not have permanently laid off/and or discharged the discriminatees in the absence of union activi-

3. Contrary to our dissenting colleague, we also agree with the judge's thoroughly-analyzed determination that severance agreements signed by 11 of the 13 laid-off employees do not prevent the Board from fully remedying the Respondent's unlawful discrimination against them.

The severance agreements, by their terms, provided a payment to each discriminatee ranging from four to eight weeks pay (depending on seniority). The Respondent and our dissenting colleague contend that the employees who signed the agreements waived their right to pursue any Board charges based on their discharges. We disagree.

First, in evaluating the severance agreements, the judge correctly applied the criteria of *Independent Stave*, 287 NLRB 740, 743 (1987).[5] The judge noted that the Union had not agreed to be bound by the severance agreements; that the General Counsel contested the validity of the agreements; that while the Respondent did not have a previous history of violating the Act, the severance agreements were executed in an atmosphere of serious, unremedied unfair labor practices; and that the agreements not only left many of the Respondent's unlawful actions unremedied, but also failed to provide for remedial notice to the plant's other employees and for reinstatement.[6] Moreover, the violations at issue were directed toward employees of the facility at large and not just to the individuals terminated.[7]

In addition to the severance agreements' inadequacy under *Independent Stave*, it is well established that the Board will not uphold a severance agreement that "was not a bona fide offer of settlement, but was extended as part of a broader scheme to eliminate union supporters." *Clark Distribution Systems*, 336 NLRB 747, 751 (2001). The severance agreements in this case were part and parcel of the Respondent's effort, through plantwide threats and a mass layoff, to prevent any of its production employees from winning union representation. In all of those circumstances, we agree with the judge that it would not effectuate the purposes and policies of the Act to accept those severance agreements.[8]

In our dissenting colleague's view, the severance agreements should be enforced because the judge misapplied two of the *Independent Stave* factors. He emphasizes that the Respondent had no "history" of violating the Act prior to the events at issue in this case, and asserts that in this context there is no Board precedent for considering violations found in the same case. He also asserts that the severance agreements' failure to remedy the Respondent's plantwide threats, to provide for reinstatement or to include notice to the other employees of the Respondent's discrimination do not weigh against enforcing the agreements.

Overall, our colleague's arguments fail to come to grips with the fact that the severance agreements were inextricably intertwined with the Respondent's underlying discrimination and the plantwide threats the Respondent made to all its production employees during the same time frame. As the judge found, the Respondent reacted to the Union's victory in the painters' election by issuing public threats to retaliate, including plant closure, if employees voted for or supported the Union. In fact, having earlier learned that the Union would probably win the painters' election, the Respondent—on the eve of that election—finalized its plan for the mass layoff to occur

ty. However, in view of the other evidence in the record, we would make the same finding even in the absence of Hughes' report and testimony.

With respect to the Respondent's layoff of the seven weld-fabrication employees, we observe that the judge's findings are further strengthened by the following facts: Prior to the Union winning the election in the painters' unit, General Manager James DiBiagio had repeatedly assured employees that he was trying to avoid layoffs "at all cost," yet the Respondent quickly laid off those weld-fabrication employees after the painters' election. The Respondent made the layoffs permanent rather than temporary—"a permanent ending of the employment relationship," as Human Resources Manager Debra Schultz put it—notwithstanding the Respondent's acknowledgment that it had previously experienced difficulty finding qualified employees. The record indicates that the Respondent had undercarriage and compact track loader work that discharged weld-fabrication employees could have performed. In sum, the record as a whole fully supports the judge's findings that the Respondent's decision to implement a permanent layoff in the weld-fabrication department was unlawfully motivated, and that the Respondent would not have taken that action absent the painters' selection of the Union as their representative.

[5] Under these criteria, "the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes." Id.

[6] Citing *Flint Iceland Arenas,* 325 NLRB 318, 319 (1998), the judge noted that a private settlement that combines lack of reinstatement with lack of notice to other employees "is particularly at odds with the Act."

[7] The judge found that there was no evidence implicating the remaining *Independent Stave* factor: fraud, coercion, or duress by a party in reaching the severance agreements.

[8] Our dissenting colleague attempts to distinguish *Clark Distribution Systems* in part on the ground that there, unlike here, the complaint alleged that the employer's offer of the severance agreements was unlawfully motivated. But whether the Respondent's offer of the severance agreements in this case independently violated the Act is not the issue. The only question is whether we should treat those severance agreements as a bar to providing full remedial relief to the 11 unlawfully laid off employees who signed them.

immediately after the election in its assembly unit, scheduled a week after the painters' election. The laid off employees were offered the severance agreements at the time of the mass layoff.

Under these circumstances, it is impossible to view the severance agreements as separate from the Respondent's surrounding unlawful misconduct. Because we have found that the Respondent laid off the discriminatees with the unlawful motive of defeating the Union, it follows that the Respondent should not be permitted to rely on the severance agreements, which at a minimum facilitated its unlawful conduct.

But even taking our colleague's arguments on their own terms, they remain unpersuasive. With respect to the fourth *Independent Stave* factor—whether the Respondent has a history of violations of the Act—we disagree with his premise that only past violations are relevant. The very purpose of considering an employer's history of compliance with the Act, as *Independent Stave* provides, is to prevent a party with a proclivity to violate the Act from exploiting a settlement or severance agreement to insulate itself from liability. It would make little sense to give weight only to unlawful acts committed in the past and to disregard the immediate context of the agreements at issue.[9]

Our dissenting colleague also asserts that the Respondent's plantwide threats, and the severance agreements' failure to provide for reinstatement or notice to the other employees of the Respondent's discrimination, do not weigh against enforcing the agreements. Here again our colleague fails to recognize the interconnection between the violations found in this case and the *plantwide* impact of those violations. As the judge found, "[t]he alleged unfair labor practices were directed toward the facility at large and not simply to the individuals terminated." The remedy for the unlawful discharges of the 11 discriminatees who signed the severance agreements is therefore inseparable from the remedy for the Respondent's overall course of conduct to prevent unionization – the legality of which the Board must determine in any case, notwithstanding the severance agreements the Respondent made with some (but not all) of the laid off employees.[10] For this reason, the agreements' failure to provide either reinstatement or notice of the Respondent's obligation to remedy that unlawful discrimination to all the other affected employees weighs strongly against enforcing them.[11]

Separate from the application of *Independent Stave*, the judge also properly found, for the reasons he explained, that several of the requirements imposed by the severance agreement would reasonably tend to chill statutorily protected activity, and that the agreements were unenforceable on that independent ground. Specifically, the signatory employees agreed (1) "without limitation," to "assist" [the Respondent] in any matter . . . about which [the employee] may have knowledge, information, or expertise"; (2) not to disclose or use "for [the employee's] own benefit" any "secret or confidential information," which was defined to include "employee" information; (3) to "obtain the Company's permission" for disclosure whenever the employee has "any doubt about whether any information is secret or confidential"; and (4) to "not make negative or critical statements about the Company."

Our dissenting colleague contends that in relying on particular terms in the severance agreements to reject them, the judge violated the Respondent's due process rights because those terms had not been alleged to be independently unlawful. We disagree. The judge did not find those provisions to separately violate the Act, but merely relied on them as a separate basis for refusing to give effect to the severance agreements. Moreover, again, it was the Respondent that put the provisions at issue by raising the agreements as a defense. The terms speak for themselves, and the Respondent has not cited any evidence it might have introduced to explain why the terms should not invalidate the severance agreements.

[9] In this connection, it is also important to recognize that the *Independent Stave* analysis, by its own terms, is "not limited to" the four factors it enumerates. Those factors are a guide "to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement." 287 NLRB at 743.

Our dissenting colleague is mistaken on the question of supporting precedent: in *Clark Distribution Systems*, supra, the Board found the severance agreements unenforceable based on misconduct the Respondent was found to have committed in that case, not earlier. We do not, however, rely in this connection on *Goya Foods*, 358 NLRB 345 (2012), or on *Flex Frac Logistics*, 358 NLRB 1131 (2012), as did the judge. We rely instead on *Flex Frac Logistics v. NLRB*, 746 F.3d 205, 210 (5th Cir. 2014), which enforced the latter decision. We also rely on *AT&T Mobility Services,* 363 NLRB No. 99, slip op. at 8–9 (2016); *McKesson Drug Co.*, 337 NLRB 935, 937–938 (2002); and *Ishikawa Gasket America,* 337 NLRB 175, 175–176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[10] By contrast, the refusals to hire that were resolved by the settlement agreements in *Independent Stave,* cited by our colleague in this connection, were the sole issue in that case.

[11] Contrary to our colleague's argument, the fact that our Order will remedy the nonlayoff violations does not cure the problem. Were we to accept the severance agreements, the nonlaid-off employees would remain unaware that: the Board had adjudged the Respondent's layoffs to be discriminatory, the laid off employees were entitled to offers of reinstatement, and the Respondent was prohibited from future like or related unlawful conduct. Further, the *Independent Stave* factors indicate that the acceptability of a proffered settlement should be analyzed in light of the circumstances present at the time it was executed.

Nor, for that matter, has the Respondent itself even contended that it was denied due process.[12]

In sum, we conclude that the judge properly determined not to give effect to the severance agreements, for the reasons he cited.

ORDER

The National Labor Relations Board orders that the Respondent, A.S.V., INC. a/k/a Terex, Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening employees by telling them that by choosing union representation they had damaged the Respondent.

(b) Threatening employees that the Respondent would or could close the facility because of employees' support for the union or if employees voted for the union.

(c) Threatening employees by telling them that the Respondent has closed most of its unionized facilities.

(d) Threatening employees that the Respondent did not trust employees who favored the Union and that if the Respondent's general manager could not trust employees, they are nothing to him.

(e) Threatening employees by telling them that the future of their facility depended on the results of the upcoming representation election.

(f) Threatening employees by telling them that the president of the Respondent's corporate affiliate decided where the facility's work was to be performed and that he would decide whether work was performed at the employees' facility or at other facilities, based in part on his view of the workforce's "flexibility."

(g) Threatening employees by telling them that the Respondent had closed and moved worked out of some of its facilities because the employees of those facilities chose union representation.

(h) Threatening employees by telling them that the president of the Respondent's corporate affiliate could move work out of the facility if he wanted to.

(i) Threatening employees with unspecified retaliation because they voted for the Union.

(j) Coercively interrogating employees about their views of an antiunion meeting conducted by the Respondent.

(k) Terminating and/or permanently laying off employees because of employees' union activity and to discourage union activity.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended by this decision.

(c) Compensate Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations and/or permanent layoffs of Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, and within 3 days thereafter, notify each of them in writing that this has been done and that the terminations and/or permanent layoffs will not be used against them in any way.

(e) Recognize, and upon request, bargain with the Union as the exclusive representative of the assembly employees unit, and, if an understanding is reached, embody the understanding in a signed agreement.

[12] Our colleague would also prefer to replace the *Independent Stave* test with a "knowing and voluntary" standard that is more deferential to an employer's interest in enforcing settlement agreements reached prior to the filing of Board charges. We note, however, that Congress, in Sec. 10(a) of the Act, provided that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. §160(a). The priority placed by Congress on enforcing the Act militates against weakening *Independent Stave*'s more balanced standard.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Grand Rapids, Minnesota, copies of the attached notice marked "Appendix." [13] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election in Case 18–RC–128303 is set aside.

Dated, Washington, D.C. August 21, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER KAPLAN, dissenting in part.

I join in my colleagues' disposition of the numerous unfair labor practice allegations in this case, except in one significant respect.[1] Unlike them, I believe that the Board should reverse the judge's finding that the severance and release agreements executed by 11 of the 13 alleged discriminatees were unenforceable and therefore did not bar litigation of the merits of complaint allegations that their permanent layoffs were unlawful. In my

[1] I agree with my colleagues and the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by permanently laying off paint department employee Persson and weld-fab employee Knight, who did not sign a severance and release agreement. With respect to the General Counsel's initial burden of proof that union animus motivated the layoffs, I do not rely on the judge's implicit suggestion that the Respondent's layoff of employees during an organizational campaign in 2012 was background evidence of animus.

I also join my colleagues in adopting the judge's finding that the Respondent's officials violated Sec. 8(a)(1) by coercively interrogating and threatening employees, including threats of plant closure and job loss. I do not believe that, standing alone, some of the contested statements by Terex construction group president George Ellis during his June 23 speeches to employees would violate Sec. 8(a)(1). However, I agree they were unlawful because they were inseparable from and infected by unlawful threats made by the Respondent's general manager, James DiBiagio, in his June 19 speech to the assembly employees. In this respect, I note that according to credited testimony, Ellis began his speech by stating that he supported everything DiBiagio said in the prior meeting.

Finally, I agree with my colleagues that a remedial bargaining order for the assembly department employee unit is warranted pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). In the week prior to the election held in that unit, the Respondent's senior officials made several widespread threats, including hallmark threats of plant closure and job loss. A week after the election, the Respondent also unlawfully discharged a majority of paint department employees in the wake of their a vote for union representation, sending a signal to assembly unit employees, for whom postelection issues remained unresolved, that they could suffer the same if ultimately represented by the Union. On this point, even though I believe that the severance and release agreements executed by five discharged paint department employees barred litigation of their 8(a)(3) claims, it is appropriate to consider those discharges as background for purposes of assessing the likelihood of conducting a fair election, free of the lingering effects of the Respondent's unlawful actions, in the foreseeable future. Like my colleagues, I would deny the Respondent's motion to reopen and supplement the record in order to submit into evidence a collective-bargaining agreement it reached with the Union for the paint department unit after the judge issued his decision. Although I would find that the proffered evidence is admissible, the execution of a bargaining agreement in that unlawfully diminished unit would not affect our conclusion that a remedial bargaining order for the assembly department unit is a necessary remedy.

view, the judge's finding represents an erroneous application of extant law and also deprived the Respondent of due process by relying on factors not alleged by the General Counsel as relevant to this issue.

When employees in the paint department and welding and fabrication ("weld/fab") department were permanently laid off, they were offered a severance agreement that included severance pay to which they were not otherwise entitled in exchange for a broad release and waiver of potential claims or causes of action arising on or before the layoff date under numerous specifically identified laws, including the National Labor Relations Act. All but two of the thirteen alleged discriminatees in this case signed the agreements. Most of them received four weeks of severance pay, but some of the longer serving employees received eight weeks of pay. Employees over age 40 were given a 45-day period to examine the agreement, with the express acknowledgment that "[t]he Company has told me to discuss this Agreement and Exhibit A with a lawyer."[2] The severance agreements also contained provisions obligating the signatory employees (1) to cooperate with the company in any subsequent investigations or litigation on matters about which they had knowledge, information, or expertise, (2) to refrain from disclosing confidential information learned during their employment, and (3) to refrain from making negative or critical statements about the company or any of its employees.

Purporting to apply *Independent Stave,* 287 NLRB 740 (1987), the judge found that the agreements executed by the 11 alleged discriminatees did not bar their unlawful discharge claims. The judge also found that the above mentioned three provisions in the agreements "render [the agreements as a whole] unenforceable, quite apart from an *Independent Stave* analysis." I acknowledge that the *Independent Stave* analysis is the current Board standard for determining whether to give effect to broad severance agreements as waivers of the right to file charges with the Board or to have charges filed on their behalf,[3] but I believe that the judge erred both in his application of this analysis *and* in his consideration of factors unrelated to that analysis and the complaint's allegations.

In *Independent Stave*, the Board identified four factors to examine in determining whether to give effect to non-Board settlements of unfair labor practice allegations: (1) whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violating the Act or has previously breached settlement agreements.[4] As to factor 3, the judge correctly found that there is no evidence of fraud, coercion, or duress by the Respondent. The 11 employees who signed agreements did so voluntarily. Accordingly, this factor weighs in favor of finding that the agreements should bar litigation of allegations that the Respondent unlawfully discharged these individuals. On the other hand, inasmuch as the Charging Party Union has not agreed to be bound, and the General Counsel opposes the settlement, the judge correctly found that factor 1 weighs against approval. Still, Board precedent makes clear that this factor alone will not preclude giving effect to a severance agreement.[5]

The judge's analysis went off the rails in his consideration of *Independent Stave* factors 4 and 2. As to factor 4—whether the respondent has a history of violating the Act or has previously breached settlement agreements—the judge acknowledged that the Respondent had not breached any prior settlement agreement and had no history of violating the Act in other Board cases. He nevertheless found that the severance agreements were executed in an atmosphere of serious unremedied unfair labor practice allegations *in the present case* and that this atmosphere weighed against accepting the severance agreements. The judge relied on the Board's rejection in compliance proceedings of private settlement agreements signed by two discharged employees in *Goya Foods*, 358 NLRB 345, 346–347 (2012). That decision was invalidated by virtue of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2014 (2014). In any event, the Board's rationale in *Goya* was primarily based on facts not present in this case.[6] Apart from the invalid

[2] The initial agreements given to employees over age 40 mistakenly did not include the referenced Attachment A, a listing of age information required by the Older Workers Benefit Protection Act (OWBPA) for waivers of Age Discrimination in Employment Act (ADEA) claims. Corrected copies with this attachment were subsequently given to these employees and resigned by them.

The Respondent also gave notice of the layoffs to the Union on June 26 and offered to engage in effects bargaining about layoffs in the painters unit represented by it.

[3] See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007).

[4] *Independent Stave Co.*, 287 NLRB at 743.

[5] See *B.P. Amoco*, supra, 351 NLRB at 615 (giving effect to severance and waiver agreements voluntarily signed by alleged discriminatees but opposed by General Counsel and Charging Party) , and *Hughes Christenson Co*., 317 NLRB 633, 634 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996)(same).

[6] The judge acknowledged the invalidation of *Goya* but expressed agreement with the Board's rationale for rejecting the severance

and distinguishable *Goya* decision, there is no precedent supporting the view that unfair labor practice allegations remaining for litigation after a non-Board settlement of other allegations in the same case should be viewed as presenting a *history* of violations under *Independent Stave* factor 4.

The judge doubled down on his mistaken factor 4 analysis in his consideration of *Independent Stave* factor 2. He found that the severance agreements were unreasonable because they left many complaint violations unremedied, failed to provide for notice to other employees of the resolution of the unfair labor practices alleged with respect to those who signed the severance agreements, and did not provide for reinstatement. Again, none of this finds support in precedent under *Independent Stave*. The judge's rationale strongly implies that a partial non-Board settlement of unfair labor practice allegations cannot ever be deemed reasonable and enforceable. Rather, it must resolve all pending allegations, provide notice to all affected employees, and offer reinstatement to all alleged discriminatees. That is an extreme distortion of the *Independent Stave* multifactor analysis, giving dispositive weight to an erroneously narrow definition of what the Board considers to be a reasonable settlement. Even in cases specifically limited to the private settlement of unfair labor practice allegations—the traditional setting for *Independent Stave*—the Board has never held or implied that it would not defer to a partial settlement of complaint allegations or to settlement of 8(a)(3) discharges in the absence of provision for reinstatement or notice. On the contrary, in *Independent Stave* itself, the Board explicitly endorsed approving private settlement agreements that provided for less than a full remedy, stating that "[w]hen we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act." 287 NLRB at 743. Further, the Board overruled *Clear Haven Nursing Home*, 236 NLRB 853 (1978), to the extent that case held a settlement agreement must be rejected because no backpay was provided for reinstated discriminatees and there was no provision for notice to employees of the employer's unfair labor practices.[7]

My colleagues go even farther afield than the judge, contending that the severance agreements and the discharges subject to them are "inextricably intertwined with the Respondent's underlying discrimination and the plantwide threats the Respondent made to all its production employees during the same time frame." Quoting from *Clark Distribution Systems*, 336 NLRB 747, 751 (2001), they further contend that the severance agreement offered to the discharged employees, who were free to reject it, "was not a bona fide offer of settlement, but was extended as part of a broader scheme to eliminate union supporters." First, the General Counsel did not contend that the offer of a voluntary severance agreement was unlawfully motivated and that issue was not litigated.[8] Second, and more importantly, both the judge and my colleagues ignore the fact that those unfair labor practice allegations not covered by the severance agreements—i.e., any allegations relating to actions other than the permanent layoffs of 11 employees who signed the agreements—were not settled. *They have been fully litigated and will be remedied by the provisions in the order in this decision, which includes an affirmative bargaining order.*

Apart from his mistaken *Independent Stave* analysis, the judge also erred in finding that the provisions in the severance and release agreements requiring assistance to the Respondent, prohibiting disclosure of confidential information, and prohibiting negative comments about the Company or its employees were unlawful and rendered the agreements unenforceable. The judge's reliance on these provisions violates the Respondent's due

agreements at issue there. I note that the basis for rejecting the agreements in *Goya* is significantly distinguishable from the present case, most notably because the Board primarily relied on the General Counsel's specific and separate argument that the settlement agreements unlawfully required employees to refrain from future union activity. In addition, the *Goya* Board also relied on the judge's finding under *Independent Stave* factor 3 that the respondent fraudulently induced the discharged employees to sign their settlement agreements.

[7] The judge's factor 2 rationale, requiring a full make whole remedy, is tantamount to the standard set in *United States Postal Service*, 364 NLRB No. 116 (2016) ("*Postal Service*"), where the majority held that it would no longer apply *Independent Stave* in determining whether to approve a consent order unilaterally proposed by a respondent and opposed by the General Counsel and Charging Party. That decision was overruled and the *Independent Stave* standard was reinstated in *UPMC and its subsidiary UPMC Presbyterian Shadyside*, 365 NLRB No. 153 (2017).

[8] By contrast, the *Clark Equipment* Board found that the General Counsel made a specific allegation of unlawful motivation with respect to the two severance agreements at issue and that the issue was fully litigated. Id. at 750. Further, again in contrast to the present case, the complaint in *Clark Equipment* specifically alleged that the severance agreement there was unlawful because it contained a confidentiality provision that was not limited to the two employees' potential claims against the employer but also "prohibits the signatory employee from voluntarily providing evidence to the Board in its investigation of charges that concern other employees." Id. at 749. I respectfully suggest that it is my colleagues, not I, who are mistaken with respect to the precedential relevance of *Clark Equipment* to the *Independent Stave* analysis of the severance agreements in this case.

process rights. To repeat: the facial legality of the severance and release agreements, or any provisions therein, was not challenged in the complaint.[9] Moreover, prior to the judge's decision, the General Counsel did not rely on any of these provisions in arguing that the severance agreements should not bar litigation of the 8(a)(3) allegations. Thus, the Respondent had no notice that, in defending against these allegations, it should have proved the legality or enforceability of each of the three provisions,[10] or argued that they are severable and that the remainder of the agreement should be deemed enforceable even if those provisions were not.[11]

Accordingly, for the reasons set forth above, with the exception of paint department employee Persson and weld/fab employee Knight, who did not sign severance agreements, I respectfully dissent from the majority's affirmance of the judge's finding that the permanent layoffs were unlawful.

Dated, Washington, D.C. August 21, 2018

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that choosing union representation damages us.

WE WILL NOT threaten you that we would or could close the facility because of your support for the Union or because you voted for the Union.

WE WILL NOT threaten you by telling you that we have closed most of our unionized facilities.

WE WILL NOT threaten you by telling you that we do not trust employees who favor the Union and that if our general manager cannot trust employees, they are nothing to him.

[9] Although one of the Union's unfair labor practice charges initially challenged the agreements as coercive and overbroad, this allegation was amended out of the complaint.

[10] Inasmuch as the facial legality of each provision was not raised as an issue, I need not pass on whether I would find any of them unlawful.

[11] The severability issue was also not raised. I note that as a matter of general contract law, the Third Circuit has cogently observed that a knowing and voluntary waiver of the right to sue is not void solely because it also references an invalid provision. "You don't cut down the trunk of a tree because some of its branches are sickly." *Spinetti v. Serv. Corp. Int'l,* 324 F.3d 212, at 214 (3d Cir.2003).

My colleagues contend that there is no due process issue because the judge did not find these provisions to separately violate the Act. What the judge did find and rely on with respect to refusing to defer to the severance agreements is that the settlement agreements "are unlawful and violations of the Act" because of the presence of these provisions. The Respondent had no timely notice or opportunity to defend against this specific and material finding.

As stated, I believe the severance agreements should be enforced under the *Independent Stave* standard, properly applied. I note that no party excepts to the applicability of that standard. In my view, a different standard would be more appropriate in determining whether to give effect to a broad severance and release agreement of the kind at issue here. Typically, *Independent Stave* has been applied to assess whether to give effect to a private non-Board settlement specifically addressing and limited to unfair labor practice allegations made in charges already filed with the Board. I agree with its application in those circumstances. Once the Board's processes have been invoked, it is appropriate to give weight to the statutory public interests asserted by the General Counsel and the traditional remedies for violations alleged in determining whether the private settlement of specific pending unfair labor practice issues represents a reasonable accommodation of those interests.

Different considerations apply to a severance agreement that is executed in advance of the initiation of any litigation and is intended to avoid employment discrimination litigation altogether, not just under the Act we administer. Foremost among those considerations is the fact that the employees receive something—usually severance pay and sometimes a post-termination extension of certain benefits—as post-termination consideration that they otherwise would not receive after termination of their employment. It is my view that when an employee signs such an agreement with an employer, the Board should not inquire into whether the bargain struck is reasonable vis-a-vis potential remedies for an unlawful discharge under our Act. It should simply consider whether or not the employee's release was "knowing and voluntary." With some variation as to what evidentiary factors to consider, this is the contract-law based legal standard that applies with respect to waivers of employment discrimination claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), the ADEA, and 42 U.S.C. § 1981 ("Section 1981"). For a general review of the evidentiary variations in application of the knowing and voluntary standard, see generally Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 Fla. L. Rev. 305, 307–308 (2006).

WE WILL NOT threaten you by telling you that the future of your facility depends on the results of a union representation election.

WE WILL NOT threaten you by telling you that the president of the employer's corporate affiliate decides whether the work is performed at this or at another of our facilities based in part on his view of the workforce's "flexibility."

WE WILL NOT threaten you by telling you that we have closed or moved work out of some of our facilities because the employees in those facilities chose union representation.

WE WILL NOT threaten you by telling you that the president of the employer's corporate affiliate can move work out of your facility if he wants to do so.

WE WILL NOT threaten you with unspecified retaliation because you voted for the Union.

WE WILL NOT interrogate you about your views of meetings we conduct concerning the Union.

WE WILL NOT terminate and/or permanently lay off employees because of their union activity or to discourage union activity.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, offer Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 18 allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations and/or permanent layoffs of Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL recognize, and upon request, bargain with the Union as the exclusive representative of the assembler employees unit, and, if an understanding is reached, embody the understanding in a signed agreement.

A.S.V., INC. A/K/A TEREX

The Board's decision can be found at www.nlrb.gov/case/18-CA-131987 or by using the QR code above. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Florence I. Brammer, Esq. and *Tyler J. Wiese, Esq.,* for the General Counsel.

Charles P. Roberts III, Esq. (Constangy, Brooks & Smith, LLP), of Winston-Salem, North Carolina, for the Respondent/Employer.

Jason R. McClitis, Esq. and *Nicholas J. Johnson, Esq. (Blake & Uhlig, P.A.),* of Kansas City, Kansas, for the Charging Party/Petitioner.

Introduction

DAVID I. GOLDMAN, Administrative Law Judge. These cases arise out of an employer's response to a union representation campaign that culminated in two representation elections in June 2014 among its employees—one in a unit of the employer's paint employees, and one in a unit of its assembly employees—conducted one week apart. The union won the first election in the painters unit, but lost the second in the assembly unit.

The government, joined by the union, alleges that the employer engaged in a series of illegal threats, including by high-ranking officials of the employer at group employee meetings called by the employer. In addition, the government alleges that the employer's termination of six of the eleven painters and seven employees from the welding & fabrication (weld/fab) area of the plant—a decision finalized the night before the painters election but not disclosed until the day after the assembly election—was an unlawfully motivated response to the union activity. The government further contends that the post-

election reclassification to a lower-paid assembly classification of two weld/fab employees was an unlawfully motivated action. Finally the government alleges that a decision by the employer in May 2014 to augment its outsourcing of certain paint work was unlawfully undertaken in response to the employees' union activity.

The union seeks to have the assembly election set aside for objectionable conduct. The government, in addition to seeking traditional remedies for the unfair labor practices, contends that the unfair labor practices committed in advance of the assembly election constitute hallmark violations that render unlikely the chances for a fair rerun election in the assembly unit. The government contends that these pre-election unfair labor practices, reinforced by the postelection unfair labor practices, warrant a remedial bargaining order based on the majority support for the union demonstrated by authorization cards solicited by the union before the election.

As discussed herein, I find that most of the alleged threats are illegal, as alleged. With some exceptions, I find that the credited evidence supports the finding of violations, including a number of thinly-veiled threats that were issued by the general manager of the facility and also by his boss, the president of the construction segment of the employer's parent corporation (of which this facility is a part).

I also find that the postelection terminations were unlawfully motivated, notwithstanding the employer's contention that they would have occurred even in the absence of union activity for legitimate business-related reasons. However, I do not accept—and dismiss the government's allegation—that a spring 2014 decision by the employer to increase outsourcing, among other strategies, in an attempt to solve an ongoing wastewater discharge problem, was unlawfully motivated. Moreover, I dismiss the government's allegation that the reclassification of the two weld/fab employees was unlawful.

Finally, I agree with the government that this is a case that warrants a remedial bargaining order. In light of the unfair labor practices, their severity and likelihood of their lingering effect, a rerun election is highly unlikely to fairly measure employee sentiment. Given the employer's unfair labor practices, the preelection majority support that the union has demonstrated that it received from the assembly unit is the most accurate basis for assessing employee sentiment.

STATEMENT OF THE CASES

Case 18–RC–128308

On May 9, 2014,[1] the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union) filed a representation petition with the National Labor Relations Board (Board) indicating substantial employee support for and the Union's desire to be certified as representative of a bargaining unit of employees working in the undercarriage assembly area of the A.S.V., Inc. a/ka/ TEREX (Employer or Respondent or Terex) facility in Grand Rapids, Minnesota. The petition was docketed by Region 18 of the Board as Case 18–RC–128308.

After a hearing, in a Decision and Direction of Election issued May 29, the Regional Director for Region 18 concluded that an appropriate unit in the case was a larger unit composed of Terex's Grand Rapids' assembly area employees and directed an election in this unit. Terex's request for review of this decision was denied by the Board in an order dated June 30. *Terex*, 360 NLRB No. 138 (2014).

A secret ballot representation election was held in this case on June 25. The tally of ballots issued July 3, and revealed 15 ballots cast for the petitioner-Union, 22 against, with 2 challenged ballots. On July 10, the petitioner-Union filed nine objections to conduct affecting the election, and on October 6, withdrew, with the approval of the Regional Director, numbered Objections 2, 4–6, 7, and 9. On October 8, the Regional Director issued a report on objections, directed a hearing on Objections 1, 3, and 8, and ordered this case consolidated for purposes of hearing with the unfair labor practice cases described below.

Cases 18–CA–131987 and 18–CA–140338 and consolidation with Case 18–RC–128308 for hearing

On July 2, the Union filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Terex, docketed by Region 18 of the Board as Case 18–CA–131987. The Union filed an amended charge in this case on July 24, a second amended charge on September 3, and a third amended charge on September 19. Based on his investigation, on September 26, the Board's General Counsel, by the Regional Director for Region 18 of the Board, issued a complaint alleging that Terex violated the Act. In an order issued October 8, referenced above, the Regional Director ordered that this case be consolidated for hearing with Case 18–RC–128308. On October 9, Terex filed an answer and amended answer to the complaint denying all alleged violations of the Act. The General Counsel, through the Regional Director, issued an amended complaint on October 16. Terex filed an answer to the amended complaint on October 29.

On November 5, the Union filed an additional unfair labor practice charge alleging violations of the Act by Terex, docketed by Region 18 of the Board as Case 18–CA–140338. Based on this charge, on November 6, the Board's General Counsel, by the Regional Director for Region 18 of the Board, issued an order further consolidating Case 18–CA–140338 with Cases 18–CA–131987 and 18–RC–128308, and issuing an amendment to the amended complaint. Terex filed an answer to the amendment to the amended complaint on November 12.

A trial was conducted in these matters November 18-21, and December 9–12, in Grand Rapids, Minnesota. Counsel for the General Counsel, the Union, and Terex filed posttrial briefs in support of their positions by January 30, 2015.

On the entire record, I make the following findings, conclusions of law, and recommendations.

UNFAIR LABOR PRACTICES

I. JURISDICTION

Terex is a Minnesota corporation engaged in the manufac-

[1] Almost all events relevant to this decision and report on objections took place in 2014. Throughout, dates referenced are to 2014, unless otherwise stated.

ture of construction equipment at its facility located in Grand Rapids, Minnesota (Grand Rapids facility). During the calendar year between October 2013 and October 2014, Terex, in conducting its operations at the Grand Rapids facility purchased and received at its Grand Rapids facility goods and services valued in excess of $50,000 directly from points located outside the State of Minnesota. At all material times, Terex has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. BACKGROUND AND SHORT SUMMARY

Terex manufactures construction equipment at its Grand Rapids, Minnesota facility. Terex is part a worldwide conglomerate of businesses, composed of five "segments" (Terex is part of the construction segment) operating on seven continents with roughly $7.5 billion in annual revenue. Throughout this decision references to "Terex" or to "Terex Grand Rapids" are to the Grand Rapids entity; references to Terex Corporation are to part or all of the Terex-affiliates and parent consortium.

Terex acquired the Grand Rapids facility in 2008 from A.S.V. Terex retained the A.S.V. name, but transitioned the name of products produced at Grand Rapids to the Terex brand. At its Grand Rapids facility, Terex produces two primary products: both are construction loader vehicles used in construction, landscaping, and other such industries.

One is a skid steer machines (SSL) which is a wheeled construction loader. SSLs have only been made at Grand Rapids since approximately 2010.

The second is a compact track loader (CTL), which is the traditional loader manufactured by A.S.V. These are construction loaders that move on treads turned by "bogie" wheels. The CTLs have undercarriages under the chassis. The bogie wheels are attached to the undercarriage by rails.

In addition to manufacturing the undercarriages for its own CTLs, Terex manufactures and supplies CTL undercarriages to the Caterpillar corporation for use on its machines. The undercarriages for Caterpillar represent another (a third) significant product for Terex.

Both the SSLs and the CTLs are hydraulic driven, with diesel engines, and are manufactured in a range of models that vary in size, horsepower, and features.

Terex's Grand Rapids facility consists of a warehousing and receiving areas where materials enter the plant and are stored or delivered to the point of use. There is a fabrication operation which uses CNC machines for sleeves for pins and miscellaneous machining. Plasma cutters are used to cut flat steel, among other machinery. There is a weld department that is predominantly involved in hand welding, with one robotic welder utilized. There is a painting operation that paints the products. And finally, an assembly area where the machines are put together before being sent to shipping. There is also a significant staff of engineers, IT, buyers, planners, an inside sales person, and office staff. Approximately, two miles away there is a test track where a small group of employees work testing and working out glitches in Terex machine products. Sales are handled by an affiliated company Terex Construction Americas (TCA) headquartered in Mississippi, but the products are physically shipped directly from the Grand Rapids plant to customers.

None of the Terex employees was represented by a union until the Union's certification in the paint unit in 2014, described below. A previous attempt by the Operating Engineers Union to organize the facility in a "wall to wall" unit in 2012 had been opposed by Terex, and the Union had been unsuccessful.

Terex's general manager is James DiBiagio. DiBiagio was hired in February 2013 by the president of the Terex construction group, George Ellis, to turn the facility around. As of 2013, the facility had lost money every year since Terex purchased it in 2008. However, under DiBiagio's leadership, the financial results began to improve. In the last quarter of 2013, Terex earned enough profit to make 2013 profitable for the first year since Terex took over.

Terex's human resources manager is Debra Schultz. She has a long history with Terex Corporation but took the position at Terex in Grand Rapids in May 2012, answering to a position post that included "union avoidance or words to that affect" as part of the job description.

The current cases arise out of a union organizing campaign initiated by the Union in late February 2014. On May 9, the Union filed two representation petitions with the Board seeking representation at Terex. Instead of filing a petition seeking "wall-to-wall" representation of Terex employees as the Operating Engineers had unsuccessfully done in 2012, the Union filed two petitions covering two portions of the work force. One petition sought to represent a unit composed of the approximately 11 paint department employees. The other petition sought to represent the approximately 16 employees who assembled undercarriages.

A stipulated election agreement was reached between the Union and Terex over the paint unit, in which the parties agreed to the appropriateness of the painters unit, and agreed to an election.[2]

However, no agreement was reached with regard to the undercarriage employees. A hearing was conducted regarding the appropriateness of the petitioned-for undercarriage unit, with Terex contending that only a broader unit was appropriate for collective bargaining. After a hearing, the Regional Director issued a decision and direction of election on May 29, in which he rejected the appropriateness of the petitioned-for unit and found that the smallest unit appropriate was a unit composed of all assembly employees—a unit of approximately 42 employees and which included the undercarriage employees.[3] The Re-

[2] The stipulated painters unit was composed of the following employees:

> All full-time and regular part-time employee painters and employee senior painters who are in the Paint Department, including team leads within the Paint Department; excluding all other employees, temporary employees, managers, and guards and supervisors, as defined in the Act.

[3] The unit found appropriate was as follows:

> All full-time and regular part-time assemblers employed by the Employer at its Grand Rapids, Minnesota facility, including team leads;

gional Director's decision was upheld by the Board, which denied the employer's request for review by order dated June 30.

Terex opposed the union campaign in a countercampaign that included extensive speeches against the Union at meetings of groups of employees. Periodic meetings with all employees (usually broken up by departments for reasons of space) called "town hall" or "all hands" meetings, were regularly conducted even before DiBiagio's arrival. (Town hall and all hands are used interchangeably to refer to the same types of meetings.) These meetings were usually held quarterly but later increased by DiBiagio to monthly meetings. In addition, at least during the time period of the run up to the union elections, weekly departmental "team meetings" were conducted by DiBiagio.

As will be discussed below, two meetings in particular—DiBiagio's June 19 assembly team meeting called the day after the painters unit overwhelmingly voted for the Union, and a June 23 set of meetings conducted by Terex Construction Segment President George Ellis—are most important to events. Their speeches at these meetings are alleged to be filled with unlawful threats. In addition to these meetings, there was some campaigning against the Union by individual supervisors speaking informally with individual employees that is alleged to be unlawful.

Pursuant to the parties' stipulated election agreement, an election in the painters unit was conducted June 18, at the Employer's facility. Ten employees voted for the Union. One voted against the Union. There were no challenged ballots. The Union was certified as the collective-bargaining representative of the painters unit on June 25, 2014.

In the assembly unit, which had been found to be an appropriate unit by the Regional Director after a hearing, an election was conducted June 25. There were 39 ballots cast. Fifteen employees voted for the Union. Twenty-two voted against the Union. (The Union challenged two ballots, but given the margin, these were nondeterminative and never opened.)

On June 26, the day after the assembly election, Terex announced and implemented permanent layoffs involving the termination of employees in the paint unit and in the weld/fab department. Three painters and seven welders (three of whom were working in weld/fab and four already temporarily assigned elsewhere) were terminated on June 26. In addition, three additional painters were scheduled to be (and were) terminated on August 14. The decision to undertake these permanent layoffs was finalized by Terex June 17, the night before the painters election. The motive for these permanent layoffs is at issue in this litigation and considered below.

III. THE 8(A)(1) ALLEGATIONS

The union campaign and Terex's response

Beginning on or about February 27, the Union conducted meetings for employees at the union hall in Grand Rapids, usually every 2 weeks. Using information gleaned from authorization cards and the Excelsior list from the Boilermakers 2012 campaign, the Union regularly mailed meeting notices and union literature to the Terex employees. In addition, prior to the June representation elections, the Union handbilled with union literature at the Terex plant gate on three occasions between April and June: on or about April 7, early May, and June 2.[4]

As far as the record shows, Terex management first became aware of the union campaign in April. As the union campaign progressed, Terex moved to develop and implement a strategy to oppose unionization by its employees. Terex's Human Resources Manager Debra Schultz indicated in her testimony that she was advised by other managers about the union leafleting in the facility's parking lot on April 7. She contacted Terex Corporation Counsel Paul Smith, who testified that he learned in April from Schultz that Schultz had heard reports of union "discussions among team members." This was the first Smith had heard of any union activity at the facility since 2012. Smith visited the facility in May to "learn more" and meet with Schultz and General Manager James DiBiagio. As discussed below, the record shows that the Employer's campaign to counter the Union, while tempered in April and May, grew increasingly vitriolic in June as the representation elections approached.

As noted above, Terex regularly relied upon town-hall, all-hands, or team meetings to communicate with employees. DiBiagio would use the meetings, which lasted approximately 30 minutes to an hour, to keep employees up to date on all manner of company-related issues. Typically, each month's meeting was conducted three times with a different group of employees attending due to space considerations. Usually employees from the assembly area attended together, and employees from weld/fab, paint, maintenance, and warehousing attended another meeting. Finally, the plant's office workers attended a separate meeting as a group. Generally, the meetings were the same for each group.

At the meetings, DiBiagio was the main speaker, although occasionally others spoke too. DiBiagio used power point slides and spoke in depth about safety, financial, business, and operations issues, sharing a significant amount of information. In his testimony, DiBiagio described himself as an "open communicator" who "tell[s] it like it is to [employees]." At the meeting for which transcripts or testimony of the speeches are in evidence, DiBiagio often stressed to employees his willingness to talk to them candidly and to share substantial information with the employees.

As the union campaign developed these meetings increasingly became a venue for DiBiagio to express Terex's opposition to the Union. The first reference to the Union in a "town hall" meeting was in the April 16 meeting, just days after the Respondent learned of the union activity among employees. At that meeting, DiBiagio referenced "rumors" he had heard that some people were interested in bringing a union to the facility. He expressed respect for people's choices and opinions on the matter but stressed that if people were thinking of signing a card they should understand that it was "not a small thing. It is a big thing." DiBiagio told employees: "Just make sure which-

excluding all other employees, temporary employees, managers, guards and supervisors as defined by the Act.

[4] There was also a handbilling event in October 2014.

ever [way] you go make sure you make an informed decision is all I ask."

However, by the early June, the town hall meeting power point projections show that DiBiagio's initial laisse-faire attitude toward unionization had been scrapped. The early June town hall meeting—the record is not clear on the precise date—involved a presentation that was extremely unflattering to the Union as part of a vigorous overall effort to convince employees to vote against the Union. A further team meeting on June 12, was essentially a wide-ranging and forceful argument about reasons the employees should vote against union representation. None of the Respondent's conduct in these pre-paint election meetings is alleged to be unlawful. I merely note that there is a clear progression in the negative and vociferous tone toward unionization as the June 18 paint unit election approached.

DiBiagio's June 19 assembly team meeting

As discussed below, on the evening of June 17, the day before the June 18 painters unit election, Terex was finalizing plans behind the scenes to schedule the termination of three painters and seven weld/fab employees, for June 26, the day after the upcoming assembly unit election. Terex did not reveal its plans for the termination to employees until June 26, but the fact that Terex had made these plans informs the context in which Terex continued its campaign against the Union.[5]

On Wednesday, June 18, the painters unit employees voted 10-1 in favor of union representation. DiBiagio reacted emotionally to this vote. That night he stayed up late writing a power point script for a meeting he convened the next day, June 19, with the assembly employees—the bargaining unit scheduled to vote on a union the following week, on June 25.

The meeting was unusual for the tone—numerous employees described DiBiagio as angry—and for DiBiagio's use of profanity. (Witnesses variously described DiBiagio's demeanor as "angry," "loud," "mad," "upset" "red in the face," "eyes popping out," "really agitated . . . and ready to explode." He was "cussing and swearing.") Employees testified that this display of anger was unusual for DiBiagio and some testified that they had never heard DiBiagio curse before. It was also unusual because DiBiagio read his script to employees. Usually he projected power point slides and used them as talking points, but in this meeting DiBiagio did not project his power point slides, rather, he read what he had written the night before.

Assembly employees were told by one of their lead employees that they were to go to the main break/lunchroom to attend this mandatory meeting. In addition to DiBiagio, numerous other managers were present. The meeting was relatively short, lasting 10–20 minutes by various estimates.

DiBiagio read his script to the assembly employees. That script was introduced into evidence (GC Exh. 11) and stipulated by the parties to be the text of DiBiagio's talk. Here I reproduce much (but not all) of it:

Listen Up

• Yesterday the paint department voted 10–1 in favor of the union.

• They are claiming a great victory but I am not so sure they will be happy down the road with the decision they made. Especially since they don't have a clue what in the hell they even voted for.

• Nobody **WON** anything with that election yesterday

• not the union- because it is going to cost them a fortune to deal with that mess

• not the company—for a number of reasons that should be obvious

• and certainly not the painters because now have taken a huge risk with their decision to be represented by the union

And then there's all of the horse shit:

• The Black List
• The Big Strike
• And the others

• The mudslinging arm twisting bullshit I told you was going to happen and the damage it has already done is inexcusable .

Credibility

To me credibility is everything.

·If I can't trust you, you are nothing to me.

·If you can't trust me, I am nothing to you

When I got here a little over a year ago this place was in serious trouble and I made a promise and a commitment to do everything I could to fix it so you could be successful and earn the job security we all deserve.

I have worked my ass off to do everything I could possibly do to help you and I have the track record to prove it. You know you can trust me. I have been straight with you since the day I walked in here and I am going way out on a limb to be straight with you right now. Yet you want to bring in a damn union for what?? What have they done to earn your trust?

. . . .

Remember the pig joint venture that fell through early last year?

Remember the visit George Ellis and Ron DeFeo made here last summer?

Remember when Kevin Bradley our CFO came a couple months later with the entire entourage of accountants and Merger & Acquisition people?

There were a few others as well poking around in our kitchen. Do you have any clue what those joint ventures and visits were all about?????

Take a guess ... We've been on the block more than once and those people were here sizing us up.

The only 3 things that have saved our asses so far are:

[5] DiBiagio testified that Terex decided not to convey the termination decisions until after the elections in order to avoid any kind of "interference" with or impact on "the integrity of the elections."

1) The G[rand] R[apids] mgt team put together a plan that convinced them would work
2) The G[rand] R[apids] mgt here worked our asses off to successfully execute that plan
3) The hard work all of you Team Members have done to help turn this place around

I have had to fight for your existence each and every day to keep the wolves at bay and just when we build a little breathing room here we go pulling a dumbass move like bringing in a union

• Our business is dropping like a rock. Orders are plummeting, we are going to go through a rough time over the next several months and instead of pulling together to weather the storm you decide to bring in a union?

Unfuckin believable.

The message received is despite the yr o yr pay increases and despite the
continued benefit packages, ... What you are saying is:

1. All that isn't good enough for you

2. You would rather work through a union that doesn't know shit about us than to work with the mgt team that has been working so hard for you

3. You don't believe a thing I have been telling you and you don't give a shit about anything I have done for you.

• Don't you see what is going on in the world around you?

• Don't you see what is going on right here right now?

• Who in their right minds does this kind of crap anymore and expects to succeed?

• Terex had multiple unionized factories, most of them are gone.
• Remember the map you were shown during the last campaign with the red stars etc? [6]

• I had to close 4 union plants in my career- UAW, UAW, Asbestos & haz waste workers, Teamsters. Unionized facilities simply struggle to remain competitive

• I have had to look into the eyes of a lot of people and tell them their plant was closing. That's why I have such a passion for this and why it really pisses me off when I see the audacity in this room after all the company has done for you.

By doing all of this union crap you've thrown us back almost all the way to square one.

. . . .

Conclusion

• You need hear this because

• if I were you who are against the union I would start speaking up NOW and those of you who think bringing in a union is a good idea need a reality check

• I think the painters made a huge mistake yesterday. Time will tell but I think they made a big mistake

• I hope you all are smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of this business.

•You folks have to make a smart decision.

• I don't know what else to tell you. Have a nice day.

The June 23 George Ellis meetings

DiBiagio's meeting with assembly employees was followed by another significant meeting intended to convince employees to reject the Union. On Monday, June 23, George Ellis, the president of Terex's construction segment and DiBiagio's boss, flew to Grand Rapids to address the Terex employees. Ellis, whose office is in Connecticut, testified that he comes to the Grand Rapids facility a couple of times a year to review the business, but he had not been there at all in 2014. This time he came because of the union drive and the assembly election set 2 days hence, on June 25. Ellis hoped to use his influence to sway the assembly workers to reject unionization and avoid a repeat of the previous week's results with the painters election.

Ellis arrived in Grand Rapids on June 23, and went straight to the plant to give his speeches. He was accompanied by Jennifer Fox, the Terex construction segment vice president for human relations. They met Paul Smith in Grand Rapids, who is deputy general counsel for Terex Corporation and who traveled there for the speeches from his office in Redmond, Washington. The rest of the Terex Grand Rapids management team was also present.

Ellis spoke to three groups of employees—each meeting lasted between 15 and 30 minutes (estimates of witnesses varied). The first meeting was with assembly employees, "because," Ellis explained, "that was the team that I knew that 2 days later was going to have a vote . . . whether or not to be represented by a union." The second meeting was composed of the other shop floor employees with the exception of the paint employees. The meeting was primarily composed of weld/fab employees. The third meeting was "just an informational meeting" with the management team and the engineers, buyers, sales people. The meetings, particularly the first two, were substantially similar although the meeting with the assembly employees, for obvious reasons, focused on the upcoming representation election. Employees were told just before the speech ("at the last minute") that they were to attend the meeting.

According to assembly employee Nick Baker, Ellis started off by telling the employees that "he supported everything that Jim [DiBiagio] said in the prior meeting," a point that Ellis did not cover in his testimonial account of his talk, but which I credit, based on Baker's demeanor and the fact that this was one of the few points in the meeting that clearly stuck with him.

Ellis began his speech to the assembly employees by telling

[6] This was a reference to a map used by Terex during the 2012 union campaign that showed Terex facilities across the country marked by color-coded stars indicating those that were union and those that were nonunion. In 2012, a Terex Corporation HR manager explained to employees that two of the four unionized facilities had been shut down and their work consolidated into other Terex facilities. This is a theme to which Terex Construction Segment President George Ellis would return when he addressed the employees on June 23, 2014, a few days after DiBiagio's June 19 speech.

them about his background working as an 18-year old at a unionized General Electric facility. He recounted his negative reaction to being told by a union steward that he was working too hard and told the employees that such a culture was "totally against my values." After 7-1/2 months he started a nonbargaining unit career at GE and then by attending night school to earn a degree, moved through the management ranks at this unionized facility.

Ellis recounted how this GE facility had 23,000 employees at its peak, but dwindled to 5000 employees. Ellis told the Terex employees that "the majority of that change [in employment] was directly related to the lack of flexibility of working as a management and union together." Terex Corporation Counsel Paul Smith characterized this as Ellis telling employees that "when he was in management, reaching out [to] the union, and there was lots of friction and that kind of adversarial friction had been kind of, you know, from his experience, what had led in part to the need to reduce the headcount at that facility." Ellis recounted how, as a result, he had to lay off people he had known for years: the best man at his wedding, the pitcher on his childhood baseball team, and this made Ellis want to leave and do something else. But the point of this story was:

> So just that shaped my views of why, you know, I believe that in this case and at this point, I'm asking you as the team members of assembly to please vote 'no' in 2 days when you go in to vote for the Union. And it really—it's unfortunate that we're at this juncture, you know, because we've made a lot of progress at this location and in the business. And, you know, we're to the point where we're actually to a level of performance where my segment might actually be able to do a payout for a bonus scheme that we have installed to help assist the team around my entire segment. But this, you know, could hinder that from the cost of this activity.

Ellis proceeded to tell the employees that "the decisions you're going to make are very critical, you know, to allowing us to continue in a flexible work environment which will allow us to, you know, improve and grow the business." He told employees he was asking for a "no" vote.

Former assembly employee Lake—he resigned from Terex in September 2014—testified that Ellis said that "he wasn't going to pull any punches, that he was here to ask us not to vote for the union," but that Ellis also said it was the employees' decision.

Ellis then moved to providing employees with "[a] few examples" from his experience with Terex of "what I mean by flexibility." Attorney Smith recounted that Ellis "talked about . . . that in some sense all of the different manufacturing facilities at Terex are kind of in competition with each other for work . . . . And he really talked about four examples."

This theme was familiar to employees from the 2012 union campaign, when Terex Corporation officials had come to Terex and displayed a map of Terex-affiliated facilities coded by union and nonunion status and showing that two of four unionized facilities had been closed.

According to Smith, Ellis first talked about "two [examples] on the positive side." Ellis described the nonunion Terex Corporation facility in Fort Wayne, Indiana, that "went through a very, very difficult time during the downturn," but "because of their flexibility and because of their willingness to work with management" Ellis committed "to the team" that "I would, you know, as the business recovered, try to bring back as many folks as I could. The team understood that." Ellis told the employees how that business has done well, increased its employee complement, "and it's a tremendously flexible work force that really focuses on things that are important to us—safety and flexibility."

Ellis provided a second example, the nonunion Terex Corporation facility in Oklahoma City, where product lines were sold off,

> but because of the flexibleness—flexibility and the willingness of the team to work with us, we found other business to move into that facility from other Terex facilities around the world as the business grew to allow us to keep team members employed and to continue to grow that facility. And that's the kind of commitment we have as a business. It's our philosophy. If you're willing to work, you know, have our core values around safety and to have our flexibility needs that we have working with us as we, you know, develop the business, we are going to work very hard to keep you employed.

Ellis added, "So those are a couple of examples where, you know, I personally have the responsibility of deciding where work goes and I personally make those decisions because of that work environment." According to Smith, Ellis held out the prospect of "Grand Rapids as the kind of place that could gain work . . . . [T]here's an opportunity here for more work," presumably if the work force demonstrated the characteristics of the Oklahoma City and Fort Wayne facilities.

Schultz confirmed in her testimony (Tr. 1887), which I credit, that Ellis "talked about the fact that they were non-union facilities."[7]

Ellis then provided, "conversely," examples of "a couple of other locations that we had in Terex that the results were much different." As Attorney Smith testified, "he did identify those as union sites." Ellis told the employees,

> We had a location in Cedar Rapids, Iowa, represented by a union, didn't have quite the flexibility that we have in our other facilities. And part of my decision was as we move work around, we decided to close that facility. Similarly, in Wilmington, North Carolina, we had a cranes manufacturing facility there that was represented by a union and didn't have the flexibility that we quite were looking for, and that work now is sitting in my Oklahoma facility where we do have that flexibility.

In fact, as Ellis explained on cross-examination, and HR Vice President Fox explained in her recounting on direct examination of what Ellis had told employees, not only the Wilming-

[7] On direct, Ellis didn't say and was not asked if he *said* these were nonunion facilities. But on cross-examination he said they were, but it is not clear if he was saying that he expressly identified them as nonunion to employees. Smith could not remember if Ellis identified these as nonunion facilities. Based on Schultz's testimony, I find that he did expressly tell employees that these two "flexible" facilities were nonunion.

ton plant work, but Cedar Rapids plant work was sent to the Oklahoma facility.[8]

Ellis then told employees that "the reason I'm explaining this to you folks here in assembly is that I'm trying to explain to you, in Grand Rapids," that when he visited in October 2009, "the business was losing money hand over fist" and then

> about 18 months ago, I found Jim [DiBiagio] . . . and if it really weren't for Jim, this business would not be here . . . He's remedied a lot of that. Now the business is still challenged. It is definitely a challenged business, but I have 100 percent confidence in Jim. And no matter what way this election goes in a couple of days, Jim will still be here, because he's the man that's going to run this facility for me; so going forward, just want to make sure we all understand that.

Ellis admitted that in the meeting he made clear to the assembly employees that it was his decision where work goes, and if work got moved, and that as president of the construction segment he wanted work moved to a flexible facility. This portion of Ellis's speech was repeatedly referenced by witnesses. As Smith put it, on "that same topic, about the kind of competition of facilities, he said, you know, 'I'm ultimately the one that decides, at least within Construction Segment, I will be the one that decides where that work goes." Schultz, asked whether Ellis emphasized that it was his decision where work went, responded, "Yes, he said he decides." Lake, who I found to be particularly credible witness in demeanor, remembered Ellis's speech: "He spoke of being the one in charge of what work went where. He had the ability to say what work came into this facility, what didn't go." Assembly employee Justin Wiese testified that Ellis told the employees that "[h]e controls how the work force in this company goes, and that I can take this work, put it elsewhere if needed." This was echoed by lead assembly worker Baker, who recalled Ellis stating that "he controlled where all the work went and there was room in an Oklahoma facility for work. And he also said that . . . there was multiple union places in the past and there were only, I believe, two left." This testimony was further corroborated by assembly employee Steven Peterson (Ellis "talked about how he has control over where business is with Terex Construction, our facility, how he can move business around, how . . . our Grand Rapids plant could fit in another facility, that kind of thing"). Welder Anthony Knight, who attended the second meeting for weld/fab employees, testified that "the only thing that sticks in my memory was [Ellis] telling us that he was the guy that could move the plant if he so wished and that he had a plant somewhere down south that could house the work that we were doing").

Employee Bill Broking recalled the image of Ellis pointing at his chest and declaring "how he's got the authority to move plants or shut them down": "I'm the one who does that . . . not Ron DeFeo [Terex Corporation CEO], not Jim [DiBiagio], I make that decision." Michael Kossow, who attended the second (weld/fab) meeting also "remember[ed] [Ellis] distinctly pointing at himself to his chest and telling us that he was the one that determined what came in to our plant for work and what didn't and only he was the one that can make that decision."[9]

Ellis described to employees the rebound the business had in 2013, and some of the problems the business was having in the spring of 2014, and his personal (as well as the Company's) efforts to find and keep business for the facility. According to Smith, Ellis "gave a lot of credit to Jim DiBiagio in kind of getting the facility turned around." Smith described Ellis talking about Ellis "in the broader world of Terex . . . defend[ing] Grand Rapids, because there were others in the company who said 'Let's just sell the place or shut it down' . . . and Ellis told the employees 'I don't want to see that happen."

A number of employees testified that Ellis told them that "financially if we are not stable here, we could possibly move stuff to Oklahoma City." (lead assembly employee Vern Sisco); "He also said that there were facilities both in Indiana and Oklahoma capable of taking care of our work load" (Lake); Ellis said, "I can take this work, put it elsewhere, if needed" and referencing "Oklahoma" in particular (Wiese); "[Ellis] said that they had a facility, a Terex facility in Oklahoma City that was big enough to house more projects" (Kossow).

Ellis turned the discussion to pensions. He testified that he told employees that while "you're being promised a lot from the Union," specifically with regard to pensions,

> "Well, you can go and Google and Google Terex, any location around the world; and we will not agree to a pension scheme. I have been working for 15 years to undo pension schemes in some of the toughest union environments in Europe you can ever dream of; and we are just not going to do that. We will negotiate, we'll negotiate in good faith if it comes to that situation; but we will not—we will not provide a pension scheme, we just do not do that at Terex.

Ellis closed by emphasizing his desire that the employees vote against the union:

> And at this point, I really would like to make sure that I'd ask you to vote "no" in 2 days, because we really need to get on with the business at hand. We have a struggling business, we are fighting for every order we can. . . . So we're in a tough spot right now and we all need to understand that.

[8] On cross-examination, Fox testified that she could not recall if Ellis had told employees during the meeting that work done in Cedar Rapids (as well as Wilmington) had been moved to the nonunion Oklahoma facility. However, I credit her statement on direct, contained in her narrative of what she recalled Ellis saying in the meeting to employees, that Ellis "spoke about two other facilities within Terex . . . that we ended up closing; one being the Cedar Rapids, Iowa facility—that facility we closed and moved the production of some of the products to other locations; in particular, one of the products moved to Oklahoma City." As a general matter, I found Fox less forthcoming and able on cross-examination than she was on direct, and so I am inclined to accept admissions made in her direct testimony over denials made on cross-examination.

[9] Ellis testified that he "may have" but doesn't recall if he pointed at himself while making this statement. Given his admission that he "may have" and the strongly-remembered, credibly-offered image that he did by two employees, I find that he did point at himself while making assertions about his control over the work.

At some point, in either the assembly or weld/fab meeting, Ellis asked Human Resources Manager Schultz about her work at a Terex facility (called the Baraga facility) where a union had been voted in, but the membership voted down the first collective-bargaining agreement and shortly thereafter the union disavowed interest in representing the employees.

Ellis agreed on cross-examination that he told employees that regardless of the results of the election, DiBiagio, and indeed, the whole management team, would have a job. But he did not say that the rank-and-file employees would have a job. "[T]hat would be up for negotiations how we would move forward if they voted the union in." On direct, Ellis put it:

> But I will say, you know, whatever the outcome is, we're going to be fine. Terex is a big company, the management team in here will be fine, we're not going to make any changes because of this.[10]

Ellis testified that he told employees that "if you choose to vote for the Union, we'll negotiate in good faith. But at that point, ladies and gentlemen, everything is on the table that could possibly change, because the point I'm making is we will negotiate, and I know how to negotiate."

Ellis then testified that he said "that we would not close the facility or move work because a union was voted in." Or as he put it on direct, "the key thing, and I want to make sure everybody understands this, if you vote for the Union, we will not close this facility the next day or any time in the near future, so don't get confused by that." Lead assembly employee Vern Sisco corroborated that Ellis told the employees, "if [the union] come[s] in or if it doesn't come in, Terex Grand Rapids is going to be here." Smith also reported that Ellis told employees near the end of his speech that "you know, we're not going to close this place. You know, the sun will come up in a couple days here whether the union is voted in or not . . . we'll find a path forward . . . one way or another we'll work it out." The General Counsel called a number of employees as rebuttal witnesses. They testified that they did not remember Ellis making any statement to the effect that the facility would stay open whether or not a union was voted into the facility. Given the overall tenor and points made by Ellis, it does not surprise me that most employees do not recall Ellis making this point. However, I do believe that Ellis made this statement.[11]

A general note on credibility and my assessment of witnesses' recall of the Ellis meeting: five assembly employees and two weld/fab employees who testified were asked about their recollections of the Ellis meeting. Unlike Ellis, who purported to essentially recreate his entire talk from the witness stand, they recalled just snippets of Ellis' talk. I reject the Respondent's suggestion that their "limited" or "sketchy" recall undermines their credibility. In this context, I do not think that this undermines the reliability or credibility of the portions they did recall. Although the extent and sureness of their accounts varied, as a general matter they remembered the portions that struck them or seemed most important. It is normal and expected that employees, asked to recall the details of a 15–30 minute speech attended five months ago, would remember snippets, and particularly those snippets that had pointed meaning for them.

More unusual was Ellis', and to some extent, Terex Corporation Counsel Smith's and Terex Corporation HR Vice President Fox's, ability to provide essentially a narrative of the entire Ellis speech. In my view, to some extent this facility reflects sophistication—I have no doubt of the sophistication of these witnesses—and preparation, they were obviously extremely well-prepared to give this testimony. In Ellis' case, it also re-

[10] There is a minor conflict in the testimony as to whether Ellis said, as he testified, that the "management team" collectively "would be fine" regardless of the outcome, or whether he emphasized the issue by naming individually the management employees. Thus, Kossow testified that Ellis "told us that Jim DiBiagio, Dallas Gravelle, Deb Schultz, and Joan Hoeschen, no matter what happened, would always have a job." DiBiagio also testified (Tr. 1634) that Ellis did name the individual managers. (Regardless of outcome, plant would be open and "folks would be able to stay intact, including myself and some other members of the staff that he had named.") Although it is a small point, in light of DiBiagio's effective admission, I find that Ellis did name the individual managers who were not going to lose jobs because of the union drive.

[11] I note that while I credited much of their individual testimony, I do not credit three (different) points made by three witnesses. Each point was endorsed by no other witness. Kossow testified that while Ellis spoke he projected a map on a projection screen showing union Terex facilities. Numerous witnesses disputed this. None endorsed it. I discredit it. Kossow is undoubtedly referring to the map, referenced by DiBiagio the week before the Ellis meeting, and utilized by Terex during the 2012 union campaign. While Ellis did not use a map, he made a point about unionized facilities closing that management had made with the map in 2012. I also do not credit Justin Wiese's recollection that Ellis stated that "he would not negotiate with the Boilermakers." No one else recalled that, rather, witnesses recalled, as reflected in the text, that Ellis said Terex would negotiate. Of course, the fact that I am willing to credit some but not all of a witness' testimony is not unusual. It is long settled that "[i]t is no reason to refuse to accept everything a witness says, because you don't believe all of it, **nothing** is more **common** in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951); *Conley Trucking*, 349 NLRB 308, 316 fn. 18 (2007), enfd. 520 F.3d 629 (6th Cir. 2008).

I also discredit assembly employee Chris Norby's testimony, where uncorroborated. Specifically, I discredit his testimony that when Ellis discussed other facilities he affirmatively told employees that the union facilities that closed had not closed because they were union, rather "it was performance based—maybe they were losing money or not having enough work product or producing a good enough product." No one, including Ellis, testified to this and Norby, on redirect said that on this issue it "was kind of hard to remember if it was [Ellis] or if it was . . . the last time we went through a union vote" in 2012. Similarly, while DiBiagio was a good witness in many ways, and I will return to and rely on his testimony in many instances, his account of Ellis' speech included certain flourishes that seemed designed to bolster the Respondent's case rather than being an account of what Ellis said. For instance, in recalling the difficulties Ellis testified to having with the "environment" at the unionized facility where he cut his management teeth years ago, DiBiagio testified that Ellis described the problems "as being more to do with the flexibility, and ability of being able to work effectively with unions, as opposed to just, you know, a union itself as being the basis." I do not believe Ellis stated anything like that last explicatory phrase, and I do not believe that DiBiagio's conclusion in that regard is of any value or consistent with Ellis' message.

flects the obvious fact that anyone who gives a speech three times can summarize it in more detail and with more comprehensiveness than someone in the audience who hears it once. And in Fox and Smith's case, it reflects the fact that their preparation was aided by review of Fox's notes of Ellis' speech, which none of the employees, or counsel for the General Counsel, had access to as they prepared for the hearing.[12]

In any event, the fact that the employee testimony is more limited than the management testimony does not render the management witnesses' testimony inherently more reliable than the employee testimony. I have evaluated the witness testimony as best I could, and have set forth my findings as to what was stated at the meetings. I note that my credited account of Ellis' speech relies heavily (but not exclusively) on Ellis' own testimony.

The June 24 meeting assembly team meeting

A final assembly employee meeting to argue against the Union was conducted by Terex on June 24, the day before the election. DiBiagio explained voting procedures and urged employees to vote no, cataloging his view of the risks of unionization. Of particular interest, given that Terex had decided on (but not announced) terminations in the paint unit is the June 24 presentation's emphasis on the paint department's recent decision to choose union representation.

The power point slides presented to the assembly workers at the June 24 meeting include the following, from a series of slides titled, "The Paint Department's Big Gamble."

> We've been telling you for weeks that "collective bargaining" is a big gamble
> Last week the Paint Department decided they wanted to "roll the dice"
> With that decision, the painters decided they wanted to risk:
>
> • Their wages
> • Their benefits
> • All of their working conditions
>
> Tomorrow, all of you in Assembly have to decide whether you're willing to take that same risk
> You don't have to take that same "leap of faith"
>
> You have the benefit of watching to see what happens with the Paint Department
>
> You can sit back and watch in real life what happens to employees who vote for a union
>
> You have a chance to see what happens before risking your wages and your benefits
>
> If things go bad for the painters, you don't have to be in that same position
>
> If the painters get everything the union has promised, as unlikely as that is, you can always sign a new card and ask for another election
>
> You would only have to wait 12 months for another vote
>
> That way, you get the benefit of seeing a real life example play out before having to make a decision
>
> This way, you take none of the risk
>
> If the union can really accomplish everything they have promised, they shouldn't mind waiting a year before getting your $500 a year in union dues

Alleged threats by individual supervisors directed to employees during the union campaign

The Ellis meetings were held on June 23. The assembly employees were scheduled to vote June 25. Immediately after the Ellis speech, employee testimony established that a number of supervisors and managers (including those alleged by the General Counsel to have had unlawful discussions with employees) were in the assembly area who were not normally there. The complaint alleges a number of incidents of threats or interrogations by supervisors speaking to individual or small groups of employees. The record revealed a few others that are not alleged as violations but that warrant reference. Most of the incidents raised at trial occurred in the aftermath of the Ellis speech. However, at least two occurred before that. Many pose stark testimonial disputes. I will consider them below, organized based on the supervisor or manager involved.

Nancy Dahlgren

Warehouse Supervisor Dahlgren admitted to having discussions with numerous employees about the Union in the days prior to the election. A number of employees testified that she told them about her past experience with unions and plant clos-

[12] These notes were not turned over pursuant to subpoena until just before the close of the General Counsel's case. The issue was raised at trial. I rejected the General Counsel and Union's request to bar testimony from the Respondent as to events at the Ellis meeting, but made other accommodations: I offered to delay the hearing so that the General Counsel could prepare and recall employee witnesses who had testified (and presumably been prepared to testify) without the General Counsel having the benefit of these notes. I offered to provide the General Counsel and Union extra time to prepare cross-examination after the Respondent's witnesses testified about the Ellis meeting I denied the Respondent the right to introduce the notes into evidence (although it is not clear that it wanted to or would have been able to do so) and I stated that the General Counsel or the Union could introduce the notes should they choose to do so. I indicated that I would consider the issue of further sanctions posthearing and told the parties they could argue in their briefs what, if any, further action I should take. Neither the General Counsel nor the Union pursued (or referenced) the dispute in their briefs, which I construe as abandonment of the issue. In any event, I do not believe any further sanction is warranted. I do agree that there was some (although in indeterminate amount) prejudice to the General Counsel's questioning in not having the notes in advance of the presentation of its case and before presenting witnesses testifying about the Ellis meeting. However, I reject the General Counsel and Union's request for sanctions (made at trial but not renewed on brief), beyond the steps I took at trial. My review of the record leads me to conclude that the delay in turning over the notes was wholly inadvertent. The subpoenas in this case were extensive and were complied with in great detail by the Respondent. Throughout these proceedings, counsel for the Respondent worked diligently in a highly professional, cooperative, and responsible manner to facilitate subpoena compliance. Moreover, my resolution of the allegations regarding the Ellis meeting leave little actual prejudice to be complained of by the General Counsel or Union. For the very most part the allegations were proven, notwithstanding the issue of the notes of the Ellis meeting.

ings and expressed concerns that the facility would shut down if the employees voted for a union. Dahlgren thought she "told everyone I talked [to] about my past experience, about the plant closing."

On June 19, the assembly employees returned to work immediately after DiBiagio's presentation. Former assembly employee Lake testified that he was just preparing to go back to work in the loader area when he was approached by Dahlgren. She asked Lake what he thought of the meeting. Lake told Dahlgren that "I have never been and never will be affected or influenced by fear." Dahlgren commented, "I'm 52 years old and I really don't want to have to start over. I worked other union . . . places . . . and when they came in we had to move on." Lake told her that he had made up his mind and nothing she said would influence how he voted. To that, Dahlgren said, "Well, I guess I'll move back to the Cities then."[13] The conversation ended at that point, and Dahlgren headed off in the direction of other employees.[14]

Bill Broking worked in assembly. Dahlgren admits she spoke with Broking about the Union in the days just prior to the assembly election. Dahlgren admitted to telling Broking the story about her own negative experience with unionization that she told other employees. She also admitted to telling Broking in this conversation that she was "worried" that the plant would move if a union was voted in, and that she "was 52 years old" and that she "liked the job" and that "I really don't want to start over if [the plant] did move." According to Broking, Dahlgren told him, "If they get a union in here, you know, this place will close or move." I think Dahlgren's admissions, while not quite as definitive as Broking remembers them, only hint at, or provide a facsimile of the truth. She admits raising the issue of the plant moving because of the Union. I believe that Broking's assessment of what Dahlgren said better captures the gist of her comments, if not necessarily the verbatim wording.[15]

Dahlgren admits to having "more or less" the same conversation with Nick Baker, asserting that she told him she was "worried about the plant closing." As to the location of this discussion, Dahlgren testified that she had "a feeling it was in the receiving area where I talked to him." Baker testified that Dahlgren talked to him in the receiving area before the election. Baker testified that Dahlgren told him he should vote against the Union because "the plant that she worked at prior to her job [n]ow had got a union in there and it messed everything up and they closed down."

These are not materially inconsistent accounts and do not pose a material credibility dispute. I accept both accounts.

Assembler Justin Wiese testified that the day after the Ellis meeting he saw and overheard Dahlgren in the assembly area walk up to and talk to employees Miranda Clark, Greg Payne and Doris Olson, who were together in the assembly area. He testified that Dahlgren was telling them "if you guys do vote a union, they will close the place down and I don't want to have that go on." Dahlgren recalled talking to Payne and Clark together about the Union, and asking them to vote no. Dahlgren indicated that while she did not remember talking to them about her past experience with a plant closing after a union was voted in, she added, "I think I told everyone I talked [to] about my past experience, about the plant closing." Given that the story of her "past experience" was so often reported by witnesses to include the suggestion that the Grand Rapids plant would close if the Union was voted in, I find that Wiese's account is the one that should be, and is, credited.[16]

Lead paint employee Kerry Esler testified that about a month before the paint election he was in Supervisor Nancy Dahlgren's office checking on a customer's shipment and Dahlgren told him, "You know Ker, if the Union comes in, they're going to move the plant, and I'm too old to look for another job." Dahlgren denied having any conversation with Esler during the period of the union campaign, but said she had such conversations with him in 2012, during the Operating Engineers' campaign. However, as discussed below, Dahlgren essentially admitted making statements such as that alleged by Esler with other employees, during this campaign, in the days before the assembly election. I found Esler a particularly credible witness, averse to overstatement or bombast. My assess-

[13] The metropolitan area of Minneapolis and Saint Paul, Minnesota, are together commonly known as the "Twin Cities" or "the Cities." They are approximately 180 miles from Grand Rapids.

[14] This credited account in the text is based on the testimony of Lake, who offered this account clearly and convincingly. Dahlgren's version was slightly different, but all in all seemed to confirm not to contradict the essentials of Lake's version. Dahlgren testified that their exchange occurred after "one of the meetings with George [Ellis] and Jim [DiBiagio]," confirmed that she initiated conversation about the meeting, and that Lake said something—she couldn't remember all the words—regarding not being fearful. Dahlgren testified that she told Lake that "I'm worried about my job" and said that Terex was "a good place" and "I told him my circumstances and he said again that something about no fear and they're not going to put no fear in him, or something. And I said 'Well there's no jobs around here for me, unless I go to a mine. . . . I might move—if it did move,' I said, 'I'd move back to the cities, I guess." Given this testimony, and given that Dahlgren admitted saying similar things to other employees regarding her "situation," and fear of Terex closing the facility as a result of the union coming in, and the prospect that if the facility closed she would have to move back to the "the Cities," I credit Lake's more certainly-recalled version, which is not inconsistent with Dahlgren's more-haltingly presented admissions.

[15] Broking testified that this discussion, and others he had with supervisors, occurred "the same day of the vote," which would have been June 25. I find that he is mistaken in this. The evidence is consistent with the conclusion that there was a flurry of supervisory campaigning with employees in the days before the vote, and particularly, just after the Ellis speech. But there is no evidence (other than Broking's recollection) that this occurred the day of the vote. Had it happened then, I believe there would be significant evidence of it, not just one employee's recollection, as the 24-hour bar on systematic campaigning before an election would have been an issue.

[16] I recognize that Wiese's pretrial affidavit, provided within a month of these events, indicated that the employees Dahlgren spoke to were Clark, Payne, and an employee named Erikson, not Olson. However, notwithstanding this error, Wiese never expressed any doubt or confusion as to the substance of the remarks he heard from Dahlgren and, indeed, reaffirmed his certainty at trial. Particularly given Dahlgren's repeated offense along the same lines, I credit Wiese's substantive account of what Dahlgren said. Whether or not Olson was present is not as important. I find that, at a minimum, Wiese observed Dahlgren making these comments to Clark and Payne, two employees Dahlgren admits that she spoke with about the Union.

ment of Esler's demeanor and testimony also leads me to credit the statements which he attributed to Dahlgren, who, as indicated, denied this encounter but has been found to have made very similar statements. She may not recall talking to Esler during the most recent union campaign, but it fits the pattern of her comments, discussed below, and I credit his account over her lack of recollection of the incident.

Buck Storlie

Testing and Reliability Leader Phillip "Buck" Storlie has been employed at the Terex facility for 19 years, for the majority of that time, beginning with A.S.V., as a supervisor. His current work is split between being at the plant and being in charge of Terex's test track site.

Employee Broking testified to being approached by several supervisors eager to discuss the Union, during a time period which I have found to be in the days just before the assembly election. Broking testified that, although he had never previously talked to Storlie, Storlie approached him and asked what Broking thought about the Union. Broking told him, I'm not sure, I've never worked for one." Storlie told him he didn't think it would be a good idea and that "he feared that the plant would move . . . if the union c[a]me in."

Wiese testified that after the Ellis meeting, he saw Storlie in the assembly area speaking with Clark, Payne, and Olson. According to Wiese, Storlie was "trying to get them to vote 'no'" and that "he said that the union comes in this place, they will shut it down." Wiese testified that he heard this clearly.[17]

Brandon Rajala, a metal fabricator who had been temporarily deployed to the test track since February 2014, testified about an incident that occurred with Storlie a week or so after the assembly election.[18] Storlie was on the telephone with Rajala "coaching" him through an online application for a position posted on the Terex corporation website, when Rajala remarked, "Wow. Terex has got a lot of plants all of the United States." Rajala testified that Storlie replied, "Yeah, Terex is not screwing around. We will move the plant."[19]

Storlie testified that he initiated conversations with numerous employees about the Union while they were working in the day or two before the assembly election. None of them were employees he supervised. He denied being told to go to the assembly floor and talk with employees about the Union, but admitted that the prospect of doing so "may have been discussed with co-workers" and that he "was aware that there were people—there were a lot of union discussions going on . . . I wanted to be part of those discussions, because I had an opinion." Although denying that he was told by any manager to go to the assembly floor to talk to employees, he admitted "report[ing] back to the management team that I had been having discussions" and agreed he "probably" provided names of at least some of the employees he talked to about the Union.

With regard to these three particular incidents, Storlie admitted to initiating a conversation with Broking about the Union a day or two before the election. At the hearing, he recapitulated a lengthy pitch against the Union that he said he gave to Broking. Asked if he referenced the plant shutting down or moving, he denied it, but admitted he "would have said" that "if we're going to be successful and continue to be here" that "we need to be competitive in this industry." Storlie admitted having a conversation with Clark and Payne at about the same time, and that he gave them a similar speech against the Union as he had given Broking. He denied saying that "the plant might or would shut down based on a union," but "I did say . . . that we need to be competitive in our cost structure and successful, if we're going to be here for a long time."

Storlie's comments to Broking were overheard by welder Mike Kossow who was working on a light duty assignment in assembly greasing bearings with Broking the day before the election. Kossow was working a few feet from Broking. Kossow testified to four supervisors—from areas other than assembly—fanning out into assembly to discuss the union with employees. Specifically as to Storlie, Kossow heard Storlie tell Broking that "he wasn't told by anyone to come down to the floor," but "was just curious on his own accord." He heard Storlie tell Broking that "if the Union comes in they would probably shut the plant down."

As to Rajala, Storlie recalled talking Rajala through the application process on the phone as described by Rajala, and helping him select the job and the correct Terex facility from the computer drop down list. Storlie testified that he recalled no conversation regarding the number of Terex facilities, and did not say anything about the possibility of the plant moving, or about Terex "not screwing around."

I credit the employee testimony and discredit Storlie's denial. Storlie admits he told the assembly employees a similar story, and the similarity, but including a threat of plant closure, is also found in the testimony of three witnesses (Broking, Kossow, and Wiese) who heard Storlie's comments. Moreover, Storlie admitted, in a fashion, that he raised the prospect of plant closure, albeit garbed in warnings about competitiveness, and what must done "if we're going to be here a long time."

Finally, I credit Rajala's testimony regarding his phone conversation with Storlie. Although after the election, these comments seem in keeping with Storlie's pre-election views and expressed position. Rajala testified credibly to this event. His demeanor seemed matter of fact, and without exaggeration about what had happened.

However, there is another incident involving Storlie, that occurred a week or perhaps two before the assembly election, as to which, I do not conclude that it happened as described. By way of background, in early February 2014, weld/fab employees Brandon Rajala and Mike Willson were temporarily transferred to Terex's test track site a couple of miles down the road from the main facility, and worked there under Storlie's super-

[17] Wiese's pretrial affidavit stated that Storlie made this comment to Payne and Clark. It did not mention Olson. As with Wiese's testimony regarding Dahlgren's comments (see above) while this raises an issue as to *whom* Storlie made his comment, I do not believe it does much to call into question the fact that Wiese heard the comment made (at least to Payne and Clark). Wiese affirmed that he was "certain" that Storlie made the comments.

[18] Rajala testified that the incident occurred after the election (June 25) and before his pay was reduced effective July 7, as part of a reclassification of Rajala from weld/fab to assembly.

[19] Storlie did not explicitly state the circumstances under which they would move the plant, but Rajala testified, "you knew what he was getting at."

vision. Neither Rajala nor Willson was eligible to vote in the assembly election. In a discussion about the Union initiated by Rajala while he, Willson, and Storlie were standing just inside the building in the garage door opening, Rajala testified that Storlie told Willson and Rajala that the choice was theirs about whether to have a union: "It's up to you. It's your choice. But Terex is not fucking screwing around. They will move the plant. So make the right decision." Willson told a less pointed but consistent version of the same story. Willson testified that Storlie "strongly voiced his opinion himself against the Union, stating that Terex has the power to do whatever they want and they could close the plant or move the plant." According to Willson, Storlie also said that "it would be a bad thing for a union to come in and . . . it would probably hurt us more than benefit us."

However, I do not find that Storlie threatened Willson and Rajala with plant closure in the event of unionization. Willson's pretrial affidavit, while appearing to cover the same conversation, did not mention anything about Storlie saying that Terex could close or move the plant. Rather, his affidavit stated that "I have not personally heard Storlie say that the Union would hurt the plant, but he has made comments about how the Union would be a headache with the negotiations." At trial, when this was read to Willson, he stated that he did not recall it. On redirect he reaffirmed that there was a conversation with Storlie and Rajala, but emphasized that "I do remember [Storlie] saying that . . . Terex does have the power to . . . basically do whatever they want with the situation if the Union decided to come in." This is undermining to Willson's claim, and by extension, to Rajala's.

Storlie recalled a conversation, at approximately the same time (approximately 2 weeks prior to the assembly election) and just inside the garage door, in which either Rajala or Willson asked him what he thought of the Union. Storlie's answer, in his testimony, struck me as extremely long-winded—probably longer than it actually was, and focused on explaining that he did not think a union was a good idea and that unionization would have a negative impact on competitiveness, both among the Terex companies and with outsiders. (This is similar to what he claimed he said to employees on the assembly floor.) Asked whether he said anything about the possibility of the plant being moved or closed, Storlie did not answer directly, but stated that "There was discussion around the fact that we need to focus on value add. And if we're profitable, we're going to be here a long time to be successful; and if we're not profitable, that we won't be successful." Storlie denied saying anything to the effect that "Terex isn't fucking around they will move this plant."

This is not an easy credibility determination. Storlie's answer seemed practiced, and vaguely familiar from Ellis' account of his speech to employees. However, Willson simply does not corroborate Rajala's statement that Storlie said, "Terex is not fucking around" and his attribution to Storlie of the tentative statement that "they could close the plant or move the plant" does not closely corroborate Rajala's account either, and even that statement was not in Willson's sworn pretrial affidavit taken no more than a month after meeting. Although Rajala's account, standing alone, seemed credible, given the undermining of the statement by the individual who testified for the purpose of corroborating it, I am unable to conclude that Rajala's testimony should be credited over Storlie's.

Bill Wake

Bill Wake is the director of product at Terex. He directly supervises about 20 employees in an engineering department composed of "degreed engineers" and support staff.

Broking testified that Wake approached him on the work floor and asked him what he "thought about a union or—and stuff like that." Broking told Wake that he wasn't sure how he felt. Broking could not remember if Wake said anything about the plant closing, although he was sure that some supervisors who approached him did. But as to Wake, Broking testified that he could not remember.

Wake testified that he sees Broking regularly, as he walks by his work area when goes on the assembly floor, which he generally does at least once a day. Wake testified that he had a conversation with Broking about the Union shortly before the election, but that the subject of the Union was initiated by Broking who, in response to Wake asking "how's it going?" responded, "it will be better when all this union stuff is over." At that point Wake testified that he engaged Broking about the Union and explained why "I personally didn't believe the union was the best choice for the workers." Wake described the conversation as lasting less than a minute and that Wake terminated it when he saw Kossow approaching because Wake "didn't feel like it was a situation that I wanted to share with another person, just basically for Bill [Broking]." Wake denied saying anything about shutting the plant down or moving and did not recall asking Broking how he felt about the Union. Wake denied having any other conversations regarding the Union with any other employees.

I found Broking an honest witness, if less than certain at times. He could not recall whether Wake made any references to plant closings. I also was favorably impressed with Wake. His testimony indicated that, other than this conversation, which he admits having, he was uninvolved in the campaign. Given all this, I credit Wake on the critical point about whether any reference was made to a plant closing, and find that he made none. Broking's testimony is not otherwise. I do, however, accept Broking's testimony that Wake asked him what he thought of the Union, a point that Wake stated he could not recall, but which he did not deny with any certainty as he did the plant closing point. I recognize that Mike Kossow testified that he heard Wake telling Broking that "if the Union came in they would shut the doors of the plant." However, "that's "all [he] heard," and given his inability to corroborate or give context to the rest of the conversation, and given both Broking and Wake's credibly-offered testimony, including Wake's testimony that the conversation ended as Kossow approached, I do not credit Kossow here. I note that Kossow was slightly farther from Wake and Broking (about 5 to 6 feet) than for the other conversations between Broking and supervisors to which he testified he was even closer. Kossow also testified that Wake "was hopping from people to people like a bee going flower to flower." The unstated implication is that Wake was having "union conversations" with numerous employees. If so, that

would contradict Wake's claim to have spoken to no one but Broking about the Union. Yet, not a single other witness testified that he or she was spoken to about the Union by Wake, or that they witnessed Wake speaking to anyone else. This leads me to believe Kossow's testimony as to Wake is wrong.

Lori Gill

Gill is the production control manager for Terex. Twenty-eight employees report to her directly or indirectly, including employees in materials planning, inventory control, master scheduling, and warehouse shipping and receiving.

Broking testified, very vaguely, that Gill approached him before the election and asked him about the Union but he did not want to tell her what he thought. Broking testified that he did not think she mentioned anything related to the plant closing.

Gill testified that she did not recall having a conversation with Broking, about the Union. She denied that prior to the election she was out talking to employees about the vote, "specifically." She could not recall saying anything about relocating or closing or moving the facility. Her testimony on cross-examination had a certain evasive quality to it, ultimately she admitted that she had multiple conversations with employees about the Union prior to the election, but she was sure that "I did not say anything unlawful."

I find that Gill approached Broking and engaged him about the Union. However, I do not find that she referenced the possibility of the plant closing. Broking specifically testified that he did not think she did.[20]

Joan Hoeschen

Joan Hoeschen manager of the weld/fab and paint operations as of July 2013. She was previously the purchasing manager for seven years before that.

Kerry Esler was the lead paint employee at the time of the June 18 paint election and had 17 years experience in the plant. Esler testified that on three occasions before the election Hoeschen initiated conversation with him regarding the Union and/or the election.

Approximately 2 to 2½ weeks before the election, Esler and Hoeschen were behind the big wash bay in the paint area and Hoeschen pointed to another employee, Lee Gustafson and asked Esler how he (pointing at Gustafson) was going to vote. Esler told her, he did not know, and said, "You would have to wait till they vote." A few days later, again behind the big wash bay, Hoeschen approached Esler and "asked me what I thought about the Union." Esler told her that "I didn't want nothing to do with it." Hoeschen told him that "being passive don't help anything." Esler walked away. Around that same time, Hoeschen approached Esler and "asked me how paint and undercarriages was going to vote." Esler told her that "paint was 80% and undercarriage was a hundred percent."

Hoeschen did not recall having any conversations with Esler prior to the election regarding the Union. She denied pointing at Gustafson. However, I credit Esler's testimony. I found him to be an especially convincing witness. He impressed me as soft-spoken but careful not to overstate, straightforward and thoughtful. I believe he testified honestly. It is hard for me to accept a contention that he made up these interactions out of whole cloth, which is, essentially, what Hoeschen is saying. Hoeschen, who was involved in and testified extensively on matters relating to determining which employees were to be selected for termination, was a good witness who "held up" well with lots of questioning (by all counsel). Yet on this issue, I cannot accept her denial (in the face of Esler's creditable testimony) that she had no conversation with Esler about the Union before the election.

Esler also testified about an incident with Hoeschen after the paint election. The election was June 18, and, as referenced above, was won in a lopsided margin by the Union (as Esler had told Hoeschen it would be). As will be discussed, on June 26, the day after the June 25 assembly election, Terex announced the terminations of three paint employees and seven weld/fab employees. There were more paint terminations to come, including the termination of Esler, a fact known to Hoeschen but not known to Esler until he was permanently laid off in the next wave of layoffs on August 14.

Esler testified that it was evident that Hoeschen was not happy about the election results in the paint department. Esler testified that approximately a week after the election, but after the June 26 layoffs, he went to Hoeschen's office to "clear the air." He testified that he "explained to her why I voted for the Union." Esler told her that he voted for the Union because "I was sticking up for my guys and they had enough votes for it to come in anyway and I decided that we had to stick together, so we all voted the way we voted." Hoeschen's response, according to Esler, was: "We'll see how that works out for you." At that time, another employee (a CNC programmer named Adam Godfrey) came in the door of the office and Esler turned to leave. Hoeschen said, "Good luck with that." Esler left, and went down to the paint department.

Hoeschen's account of her and Esler's post-election conversation sounds like an entirely different incident. According to Hoeschen, the morning of June 26, after announcement of the layoffs, which was first thing in the morning, Esler came to Hoeschen's office and said to Hoeschen, "It must have been a tough morning for you." Hoeschen testified that she said, "it was a terrible morning for me." According to Hoeschen, Esler said, "I could see that, by the people let go, it was based on skills." Hoeschen said she agreed with this. And then Esler said, "You know, the only reason I voted for the Union was to support my team." Hoeschen said there was silence, "because I wasn't even going to engage in that." And then an employee came to the door, and as Kerry left she told him, "We will fig-

[20] Kossow testified that with Gill and Broking "[i]t was the same as Bill Wake." He testified, "what I heard her tell was that, same thing, plant had the Union, they would close the plant." He added, as with the Wake/Broking conversation, "And that's all I heard, there again." With regard to Wake's alleged statement of plant closing, Broking could not remember if Wake made such a statement. Here, Broking testified affirmatively that he did not think Gill made a plant-closing reference. Kossow's comment, while offered with certainty, again, was offered with no context whatsoever: he recalls nothing but the plant-closing statement, the statement that Broking says he does not think Gill made. As I have indicated, Gill's testimony was not altogether impressive as to her recollection of her discussions with employees, but in light of Broking's testimony, I will not credit Kossow's assertion. At a minimum, his claim is undermined by Broking's testimony.

ure this out, it will all work out."

These competing accounts are, obviously, impossible to reconcile. My conclusion is as follows: in addition to my previously-stated positive impression of Esler's testimonial demeanor, I find Hoeschen's version unconvincing.

First of all, as other extensive testimony shows (Tr. 664 et seq.), Esler very much did not agree that the layoffs reflected the dismissal of paint employees based on an accurate assessment of skills. This decreases the likelihood that he would say that "I could see that, based on the people you let go, it was based on skills." As his testimony shows, he did not agree by a long shot that the least skilled employees were let go on June 26. Of course, it is possible he told Hoeschen that, even if he did not believe it, but my best judgment is that is not so. Indeed, the statement as reported by Hoeschen rings hollow to me: it is so directly supportive of the Employer's subsequent legal position and so central to a hotly disputed issue in the litigation over the terminations, that it is incredible that Esler offered this statement in June 2014. It contradicts the thrust of a central part of his testimony at trial about the employees selected for termination, as well as a central thrust of the General Counsel's case, while affirming the judgment of the Employer. An amazing bit of luck for the Employer, were it true.

More generally, in Hoeschen's version of the story, Esler plays an obsequious role, expressing concern for the stress on the boss of laying off employees, falsely pretending to agree with management's choice of which employees to dismiss, and virtually apologizing for his vote in favor of the Union. There certainly are people who take that approach, perhaps in hopes that it would spare them future problems. Obviously, I do not know Esler, but I saw no indication of that in his testimonial demeanor. It does not sound like the witness I heard.

Second, Hoeschen's claim that she told Esler as he left: "We will figure this out, it will all work out," strikes me as highly unlikely. It would certainly have been an untrue statement for Hoeschen to have made. Hoeschen knew, although Esler did not, that Esler was going to be terminated on August 14. Hoeschen created the original paint skills matrix in June for the purpose of determining which paint employees would be terminated, and the names of the six paint employees to be laid off were "run by [Hoeschen] for approval" before the layoffs, and before the union election. In short, I do not believe Hoeschen told Esler on or after June 26 that "it will all work out"—because she knew that was not true for Esler. It was not going to work out for Esler. Now again, as with Esler, I obviously do not know Hoeschen. She could have been saying that, even if she knew it to be false, as a parting comment to move Esler out of her office. But it seems to me a highly unlikely comment to make, given what Hoeschen knew. More likely than a false offer of comfort, Hoeschen showed her hand, and, as Esler claims, told Esler in reference to his explanation for voting for the Union: "We'll see how that works out for you." While it may not be very nice—and it may be objectively threatening—to sarcastically tell a 17-year employee who you know you are permanently laying off that "We'll see how that works for you" and "Good luck with that"—it strikes me as far more unlikely to assure him falsely in a private one-on-one conversation that "We'll figure this out, it will all work out." I do not believe it.

For all of the above reasons, I credit Esler's account.

Analysis of the 8(a)(1) allegations

The General Counsel alleges that statements to employees made by DiBiagio, Ellis, and by a number of the supervisors, violate Section 8(a)(1) of the Act.

The rights guaranteed by Section 7 include the rights of employees to "to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 8(a)(1) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to **interfere** with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]."

Section 8(c) of the Act provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Thus, when considering whether an employer has violated Section 8(a)(1) through antiunion exhortations to its employees, the Board and the Supreme Court recognize that Section 8(c) of the Act "implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1)." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 580 (1969) (quoting Sec. 8(c)).

In determining whether employer speech is violative of Section 8(a)(1), the Supreme Court recognizes that "[a]ny assessment of the precise scope of employer express, of course, must be made in the context of its labor relations setting." *Gissel*, 395 U.S. at 580. By this, the Supreme Court means that the Board's duty is to "focus on the question: 'What did the speaker intend and the listener understand?' (A. Cox, Law and the National Labor Policy 44 (1960))," and particularly to consider that the employer's words cannot be divorced from context, but must be evaluated with an understanding that "employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." Id. at 581 (footnotes omitted).

Thus, "any balancing" of the employee rights protected by Section 8(a)(1) and employer speech immunized by Section 8(c), "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 580.

The Supreme-Court approved interplay of these two provisions leave an employer free

> to make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a

> reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree . . . that conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. As stated elsewhere, an employer is free only to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control, and not threats of economic reprisal to be taken solely on his own volition.

Gissel, 395 U.S. at 580–581 (internal quotations omitted).

In response to arguments that the line between "permitted predictions and proscribed threats is too vague," the Supreme Court in Gissel warned that

> an employer, who has control over [the employer-employee] relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinksmanship" when it becomes all too easy to overstep and tumble [over] the brink.

395 U.S. at 582 (internal quotations omitted; court's bracketing).

Particularly in view of the Supreme Court's teaching that employer statements must be considered with an ear toward their meaning to employees sensitive to the threat of plant closings, I have no trouble concluding that the DiBiagio's and Ellis' speeches were laden with statements that, considered in context, and by reasonable implication, clearly violated the Act's prohibition on interference, restraint, and coercion of employees. Most of the allegations relating to individual supervisory statements, as credited, also clearly violate the Act. As discussed below, I find merit to many (but not all) of the complaint's allegations.

DiBiagio's June 19 speech

Complaint paragraphs 7(a)-(f)

At the June 19 meeting DiBiagio repeatedly and forcefully suggested to the assembly employees that choosing union representation would endanger the facility's existence. These comments were not "carefully phrased on the basis of objective facts" regarding "consequences beyond" the employer's control, but rather, without use of objective facts, carried the "implication that" Terex Corporation would take action as a result of union activity that would endanger the continuation of the business at Grand Rapids. *Gissel,* supra. The "conveyance of [General Manager DiBiagio's] belief, even [if] sincere, that unionization will or may result in the closing of the plant" by Terex Corporation was not, as required by the Supreme Court "capable of proof" based on "economic consequences of unionization." Id. Indeed, although most of DiBiagio's threats suggested that the parent company, Terex Corporation would be the actor that would not put up with unionization, under the circumstances it is not true that Terex Corporation's actions "are outside [the employer's] control." Rather, given that the self-proclaimed and admitted decisionmaker, George Ellis, is not only the president of a segment of the Terex Corporation but is also an admitted statutory agent and/or supervisor of Terex Grand Rapids, threats of how Terex Corporation would respond to union activity constitute "threats of economic reprisal to be taken solely on [the employer's] own volition." In other words, not only were DiBiagio's threats of how Terex Corporation would respond to Terex Grand Rapids' unionization not based on objective fact, but in addition, they were not threats of what an outside entity would do. The decisionmaker for Terex Corporation was and is an agent of Terex Grand Rapids. His volition is the Respondent's volition.

The threat of plant closing as a consequence of unionization is implicit and explicit, and woven into the fabric of DiBiagio's angry speech. Thus, after declaring that the painters "have taken a huge risk with their decision to be represented by the union," DiBiagio swiftly moved to reminding employees that "[w]e've been on the block more than once" and that the facility has been being "siz[ed] up" by Terex Corporation personnel. In this context, DiBiagio declared that he has had "to fight for your existence each and every day to keep the wolves at bay" and just as the economic situation had turned around so that there was "a little breathing room here we go pulling a dumbass move like bringing in a union." DiBiagio referenced the decline in orders and rough times coming up and called it "unfuckin believable" that instead of pulling together "you decide to bring in a union." DiBiagio declared, "don't you see what is going on here right now? Who in their right minds does this kind of crap anymore and expects to succeed?"

The foregoing reasonably and unavoidably would be understood as meaning that the "existence" of Terex's Grand Rapids facility would be threatened by a "dumbass move like bringing in a union." The clear implication was that bringing in the Union would lead Terex to decide to sell or close the facility. In other words, according to DiBiagio, only irrational or mentally disturbed employees (i.e., ones not "in their right minds") could bring a union in ("this kind of crap") and expect for the facility to succeed—in the context of threats to Terex's "existence," to succeed is reasonably understood as to remain in operation. These are, of course, opinions, whether or not sincerely held, that contain no objective facts—indeed are not susceptible to such—and in any event, effectively state that unionization will lead Terex to sell or close. As such these comments were coercive and unlawful threats that Terex would retaliate against the "existence" and "success" of the plant if the employees chose union representation. Or, at the least, that unionization would result in financial failure of the enterprise. *Weldun International*, 321 NLRB 733, 746 (1996) (CEO statement that he was afraid if employees unionized it would doom the division and other similar phrasings indicating doom constituted unlawful threats rather than free speech), enfd. in relevant part, 165 F.3d 23 (6th Cir. 1998).

DiBiagio reminded employees that "Terex had multiple unionized factories" but that "most of them are gone," and referenced a map illustrating this point that Terex had shown to employees during the 2012 organizing campaign. He then announced that he "had to close 4 union plants in my career," claimed that "unionized facilities simply struggle to remain competitive," and then, directly linking the risk of plant closing

to the "audacity" of the Terex employees voting for a union, stated:

> I have had to look into the eyes of a lot of people and tell them their plant was closing. That's why I have such a passion for this and why it really pisses me off when I see the audacity in this room after all the company has done for you.

The inevitable linkage of unionization with past plant closings is unmistakable, and unlawful when attached, as it was, to the suggestion that unionization would similarly lead to a decision by Terex to close the Grand Rapids facility. *General Dynamics, Corp*., 250 NLRB 719, 722 (1980) (linking of the closing of two other facilities and the loss of work at a third to the presence of union at those facilities constitutes an unlawful implicit threat of job loss and or plant closure); *Eldorado Tool,* 325 NLRB 222 (1997) (unlawful to question possibility of future of facility when linked to display of unionized plants that had closed); *Homer D. Bronson Co.,* 349 NLRB 512, 512–514 (2007) (unlawful to refer to other unionized facilities that had closed because of repeated strikes where employer indicated to employees that if they unionized and there were another series of strikes, the employer would close or move).

Here, DiBiagio attributed the desire by Terex to sell or close unionized facilities to unionization itself, or most charitably, to the unsubstantiated nonobjective claim that "unionized facilities simply struggle to remain competitive." It was his claims of a link between past unionizations and past plant closures that made DiBiagio "pissed off" at the "audacity" of Grand Rapids employees to support a union—this was an obvious suggestion that Grand Rapids would share the same fate if the employees unionized. This stands as a direct threat of discriminatory action by the employer.

DiBiagio also said, in the midst of bemoaning the paint department vote in favor of unionization, that "the mud-slinging arm twisting bullshit I told you was going to happen and the damage it has already done is inexcusable." Later he added, "by doing all of this union crap you've thrown us back almost all the way to square one," a reference, no doubt, to the union campaign and particularly, the painters vote, and DiBiagio blamed it for wiping out the economic gains the company had made that gave it "breathing room" from the "wolves" whom DiBiagio had opposed in his "fight for your existence." His comments constitute an unsubstantiated claim that the union campaign and the painters vote had damaged the company, or worse, made it more likely that the "wolves" would close or move the facility. Such claims are unlawful under Gissel, supra.

DiBiagio concluded his speech by warning employees that he hoped that, unlike the painters, the assembly employees were "smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of this business."

DiBiagio's statement explicitly ties "the future direction of the business" to whether or not the employees are "smart enough" not to vote to unionize as the painters just did. Terex directs the business. When DiBiagio tells employees that the direction Terex chooses will be determined by the union vote, at a time when DiBiagio is fighting for the plant's "existence," an unlawful threat is reasonably likely to be understood by any employee listening.

The above threats fully prove paragraph 7(b),[21] (d),[22] and (e),[23] of the complaint.

In its brief, the General Counsel does not offer specific examples of what DiBiagio said that support the allegation of paragraph 7(a) of the complaint, which asserts that DiBiagio "threatened the assembly employees that employees in the Painters Unit faced unspecified reprisals because they chose to be represented by the Union."

The Union supports this allegation by citing, with some cause, to the Board's decision in *Print Fulfillment Services, LLC*, 361 NLRB 1243, 1244 (2014). In Print Fulfillment, the Board held that a supervisor's statement to an employee that he was "disappointed" to learn of the employee's support for the union—combined with the supervisor's emotional behavior, walking away from the employee "red-faced," and warnings to the employee that because of his strong feelings he was "say[ing] something better left unsaid"—would reasonably place the employee in fear of subsequent reprisals. This is not so unlike the situation with DiBiagio. However, while it is clear, as I have found, that DiBiagio unlawfully threatened the employees in a variety of ways in his speech, including because of the painters actions, and unlawfully complained that the painters had hurt the Respondent by voting for the Union, I do not find that, independently of those violations, in this meeting, DiBiagio additionally violated the Act by threatening unspecified reprisals against the painters.[24]

However, a similar allegation is more clearly substantiated by DiBiagio's actions at the June 19 meeting. Complaint paragraph 7(c) alleges that DiBiagio violated the Act by threatening the "employees that Respondent did not trust employees who favored the Union" and further "that if DiBiagio could not trust employees, they are nothing to him." This allegation goes to the suggestion that runs through DiBiagio's speech that the employees' union activity represents a betrayal of DiBiagio and disloyalty to the Respondent.

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[21] "(b) At the same meeting described above in subparagraph (a), General Manager DiBiagio threatened the assembly employees that because employees in the Painters Unit had selected the Union, they had caused unspecified damage to Respondent."

[22] "(d) At the [June 19] meeting . . , DiBiagio repeatedly threatened the employees that Respondent's Grand Rapids facility could or would be closed because of employee support for the Union."

[23] "(e) At the [June 19] meeting . . , DiBiagio threatened employees that Respondent had closed most of its unionized factories."

[24] However, I note that, in very clear language, DiBiagio threatened to take unspecified reprisals against the painters for voting for the Union in his July 24 speech to assembly employees, the day before the assembly election. In that meeting, DiBiagio advised the assembly employees to vote against the Union, contending that by doing so, "You have the benefit of watching to see what happens with the Paint Department[.] You can sit back and watch in real life what happens to employees who vote for a union[.]" This, and other similar comments, reflect the increasingly fevered effort to make sure that the assembly election did not result in a repeat of the union victory in the paint department. For some reason, none of these comments from the June 24 meeting are alleged by the General Counsel to be threats of unspecified reprisals.

In a slide that he read titled "Credibility," DiBiagio stated: "To me credibility is everything. If I can't trust you, you are nothing to me. ·If you can't trust me, I am nothing to you[.]" He then stated:

> When I got here a little over a year ago this place was in serious trouble and I made a promise and a commitment to do everything I could to fix it so **you** could be successful and earn the job security we all deserve.
>
> I have worked my ass off to do everything I could possibly do to help you and I have the track record to prove it. You know you can trust me. I have been straight with you since the day I walked in here and I am going way out on a limb to be straight with you right now. Yet you want to bring in a damn union for what?? What have they done to earn your trust? [Original bolding in GC Exh. 11.]

DiBiagio later added that the employees' decision "to bring in a union" was "Unfuckin believable" and then stated:

> The message received is despite the [year over year] pay increases and despite the continued benefit packages, . . . What you are saying is:
>
> 1. All that isn't good enough for you
>
> 2. You would rather work through a union that doesn't know shit about us than to work with the mgt team that has been working so hard for you
>
> 3. You don't believe a thing I have been telling you and you don't give a shit about anything I have done for you.

Later in his speech, DiBiagio told employees, in reference to their union activity and his concern about plant closing: "That's why it really pisses me off when I see the audacity in this room after all the company has done for you."

DiBiagio's raw feeling that the employees had betrayed the Respondent, and him, by organizing a union, is hard to miss. DiBiagio was clear that the employees' "audacity" to engage in union activity, "after all the company has done for you" "really pisses me off." As DiBiagio explained, the union organizing demonstrated "you don't give a shit about anything I have done for you."

In this context, DiBiagio's assertions that "To me credibility is everything. If I can't trust you, you are nothing to me. If you can't trust me, I am nothing to you[.]"—were not part of a homily on labor relations or bromides to live by. They were part of a larger message to employees that by their union activity they had been disloyal to the Respondent—a message that was presented to all assembly employees in a mandatory meeting convened by the top-ranking official at the plant.

An employer's equation of union activity with disloyalty is opprobrium long-settled to be violative of the Act. CF *Taffe Plumbing Co*., 357 NLRB 2034, 2040 (2011) (employer unlawfully equated collective-bargaining enforcement activity with disloyalty to respondent by telling employee he was no longer part of the respondent's family); *Viracon, Inc.,* 256 NLRB 245, 246 (1981) (employer unlawfully "expressed outrage at why the employees would want a union after he had helped them so much, suggesting as it does disloyalty to their high-level supervisor upon whom their jobs and livelihood depend"); *House Calls, Inc*., 304 NLRB 311, 313 (1991) (by telling employees that by seeking union representation they "were ingrates who were hitting him when he was down, [employer] equated union activity with disloyalty to the Respondent, and we find that this conduct violated Section 8(a)(1)").

I find that in context, DiBiagio did, in fact, unlawfully convey to employees, as alleged in complaint paragraph 7(c), that the "Respondent did not trust employees who favored the Union." Further, DiBiagio was clear that if he could not trust employees "they are nothing to him." In the context of DiBiagio's overall speech, this equates to an accusation by DiBiagio that the employees have demonstrated disloyalty by pursuing union representation, and is violative of section 8(a)(1) of the Act.

Finally, the complaint alleges in paragraph 7(f) that DiBiagio "repeatedly threatened employees with adverse economic consequences because of the 'union crap.'" I do not reach this as an independent violation, as it is not separately argued by the General Counsel. DiBiagio's sole (not repeated) reference to "union crap" suggests, as I have found, that the union campaign, and the painters vote, set the company back economically, raised the prospects of the non-existence of the company, and suggested the disloyalty of those who supported the Union. However, I do not find that complaint paragraph 7(f) supports a separate, independent violation. As discussed, there is much unlawful in this speech, and to some extent the whole speech is colored by the clearly unlawful parts of it. DiBiagio's speech can be characterized as unlawful on a number of grounds, but it is unwarranted to work the same threats into multiple separate violations.

Ellis' June 23 speeches

Complaint paragraphs 7(i)-(q)

The General Counsel alleges that Ellis' speeches to the assembly and then the weld/fab employees on June 23, were rife with unlawful threats violative of Section 8(a)(1). I agree.

Ellis was the "big boss"—the boss of the facility's onsite boss, General Manager DiBiagio. His presence in Grand Rapids was an event, and as he made clear to any employees who did not know: he is the individual in the construction segment who ultimately decides whether and what work flows to the Grand Rapids facility or, instead, to other facilities within the construction segment.

His speech was carefully calculated and constructed with the goal of persuading employees to vote against the Union. But its force relied on a combination of his avowed personal power to control whether the facility received work with barely veiled threats to exercise that power to the employees' and plant's detriment should the employees defy his will on unionization. Ellis was sophisticated enough to veil his threats in stories and examples, and he avoided direct threats. Yet the message was unmistakable. His speech was practiced enough that he could essentially recreate it—albeit somewhat softened for trial—from the witness stand. As I listened I could not help but think that no employee could reasonably miss this message: the plant's work, indeed, the plant's existence was at risk if the employees' voted for the Union.

I note that early in Ellis' speech to the assembly unit workers, he made the point of endorsing DiBiagio's angry warnings to employees in his speech from the previous week. This served to reinforce—by an even more authoritative figure—the unlawful components of DiBiagio's talk.

As set forth in detail, above, Ellis then introduced his topic by describing the negative experiences he had in a unionized environment as a young worker and then manager in a General Electric plant. Through this, he subtly introduced the topic of job loss, at first anecdotally, describing how the "adversarial friction" in the unionized environment led to him having to undertake the unhappy task of laying off longtime acquaintances.

He asked employees to vote no in the upcoming election and said that the union drive was "unfortunate," because, among other reasons, "we've made a lot of progress at this location . . . [a]nd . . . we're to the point where we're . . . able to do a payout for a bonus scheme that we have installed . . . [b]ut this, you know, could hinder that from the cost of this activity." This lament that employee bonus pay will suffer because of the "cost" of combating the union drive is an unalleged but clearly unlawful broadside. *Mesker Door, Inc.,* 357 NLRB 591, 595–596 (2011); *Pilot Freight Carriers, Inc*., 223 NLRB 286, 286 fn. 1 (1976).

Ellis then moved to what may be described as the heart of his talk, announcing that "in some sense all of the different manufacturing facilities at Terex are kind of in competition with each other for work."

With this in mind, he gave four examples of how that competition played out: two facilities identified as nonunion and "flexible" (Fort Wayne and Oklahoma City), and two union facilities (Cedar Rapids and Wilmington) that "didn't have the flexibility that we quite were looking for." Ellis explained how the two nonunion "flexible" facilities were granted increased work by Terex Corporation, and he emphasized that "I personally make those decisions." On the other hand, as to the two union and less "flexible" facilities, Ellis stated that "part of my decision was as we move work around, we decided to close that facility [in Cedar Rapids]" and "in Wilmington, North Carolina, we had a crane manufacturing facility there that was represented by a union and didn't have the flexibility that we quite were looking for, and that work now is sitting in my Oklahoma facility where we do have that flexibility."

Ellis not only told these stories—delineating nonunion "flexible" plants that received work from union plants that lost their work—but lest there be any doubt, he expressly linked those stories to the possibility of more work for Grand Rapids, or less work for Grand Rapids. Throughout all of this, Ellis emphasized that it was his personal decision ("I make that decision") where work in the Terex system went, which plants received work, and which plants were denied work. As to the work at Grand Rapids, he was pointed in stating that "I can take this work, put it elsewhere if needed," and that the "Grand Rapids plant could fit in another facility." The force of his statements was made all the stronger by the employees' familiarity with the map used by Terex in mass meetings during the 2012 union campaign, and referenced by DiBiagio on June 19, which had been used to show employees that two of four union facilities had been shut and their work consolidated into other Terex facilities.

The message here was clear. And it is an unlawful message under Gissel. The suggestion was that Ellis personally takes work from union plants and gives work to nonunion plants in a system in which Terex plants are in competition with each other. This is not—by any stretch—a prediction "carefully made on the basis of objective fact to convey an employer's believe as to demonstrably probable consequences [of unionization] beyond its control." This is a prediction about the consequences of unionization based on Ellis' lifetime dislike of unions, personal authority to grant and withhold work from individual Terex facilities, and his articulated history and comparison of rewarding nonunion plants and penalizing union plants.

The Respondent cannot hide behind Ellis' reference to "flexibility" as the difference between the plants that he—Ellis—decided to shut down and those he decided to reward with work. This is a euphemism, at best—with no objective explanation of what it means—and the Board has recognized that references to a union's impingement on an employer's "flexibility" as increasing the potential of plant closing is "poor[ ] camouflage" for an unlawful threat. *DMI Distribution*, 334 NLRB 409, 419 (2001). In any event, Ellis explicitly described the nonunion status of the plants he decided to reward with work and the union status of the plants he decided to close. In a speech with the overarching purpose of convincing employees to vote against the union, the union/nonunion distinction was not casually utilized or peripheral to the message. It was the message.

After all this, I do not find exculpatory Ellis' closing remarks that if the Union was voted in the plant would not close "any time in the near future, so don't get confused by that." That was, indeed, confusing, precisely because it followed a much longer, more detailed, and methodically explained narrative devoted to suggesting to employees that he had in the past and would again personally reduce work for the plant if the employees voted in the union. It followed a declaration that "whatever the outcome" of the election "Terex is a big company, the management team in here will be fine"—Ellis listed the Terex managers by name, conspicuously omitting the rank-and-file employees from this promise of protection.

Terex, and Ellis, are sophisticated and well-counseled. He knows it is unlawful to suggest to employees that he will decide how much work comes to the facility based on whether or not they vote for the Union. His final perfunctory assurance of nonretaliation, wholly inconsistent with the gravamen of his talk, hardly immunizes, mitigates, or corrects the patently unlawful and coercive focus of the speech. As the Board and the Supreme Court have recognized, the coercive effect of particular statements can endure and outweigh other noncoercive employer statements: "an employee might reasonably be influenced by a more coercive statement than by a different noncoercive statement, in order to avoid adverse consequences." *Federated Logistics*, 340 NLRB 255, 256 (2003) (citing Gissel, 395 U.S. at 617), review denied 400 F.3d 920 (D.C. Cir. 2005). Given the overall context and specifics of Ellis' speech, the assurance that the plant would remain open "in the near future"

might as well have been said with a wink.[25]

I find that the allegations contained in paragraphs 7(i)-(p) have been proven by the General Counsel and violate Section 8(a)(1) of the Act.[26] In this regard, although the complaint alleges that some of these allegations occurred at the weld/fab meeting, and some at the assembly meeting, based on the record evidence, including admissions that the speeches were essentially the same, I find that these violations—which, in any event, are very similar--occurred at both meetings, and that this small deviation from the complaint is closely connected to the complaint's subject matter and has been fully litigated. *Pergament United Sales, Inc*., 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). As to paragraph 7(p) of the complaint, the evidence supports the conclusion that Ellis threatened assembly employees that he could move work out of the Grand Rapids facility if he wanted, but there was no evidence that he said he could do it "tomorrow," as alleged in paragraph 7(p). However, I believe that proven statement presents only a slight deviation from the words of the complaint. It is closely connected to the pled allegation and it was fully litigated. Pergament, supra.

Finally, the General Counsel alleges (GC Br. at 27) that Ellis told the assembly employees "that if the union were successful, he would not negotiate," which corresponds to the threat not to negotiate, alleged in complaint paragraph 7(q).[27] In support of this, the General Counsel does not rely on employee Wiese's testimony to that effect, which, in any event, I have not credited. Rather, the General Counsel relies upon Ellis' statement, as (accurately) paraphrased by the General Counsel, "that Terex would not, under any circumstances, agree to a pension plan with the Union." Pensions are, without a doubt, a mandatory subject of bargaining, and as the Supreme Court decided long ago, a party's refusal to negotiate about any mandatory subject violates Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). However, that is not what Ellis said. He said that Terex would not agree in bargaining to a pension, by which, I am sure, he meant (and was understood as meaning) a defined-benefit pension of the type that unions often seek to bargain but which cover a declining percentage of the work force. While good-faith bargaining requires an open mind—and Ellis' comment is not consistent with that, it is also true that Section 8(d) of the Act expressly provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." The Board has held that "The fact that one party or another may state that it will not agree to a particular clause is not sufficient to support a finding that it thereby refused to bargain over that issue." *Embossing Printers, Inc.,* 268 NLRB 710, 718 (1984), enfd. 118 LRRM (BNA) 2967 (6th Cir. 1984). I think the General Counsel has failed to prove that Ellis' comment amounts to a threat not to bargain, and I dismiss the corresponding complaint allegation, paragraph 7(q).

Allegations of threats or interrogation by individual supervisors directed to individual (or small groups of) employees

Complaint paragraphs 7(g), (h), (r)-(v)

Dahlgren

Complaint paragraph 7(g), (h), and (r)

The General Counsel alleges that after the DiBiagio meeting, Dahlgren unlawfully interrogated an employee about his reaction to the meeting and unlawfully threatened him with job loss. The General Counsel also alleges that Dahlgren's conversation with numerous employees, on or about June 23 and 24, involved unlawful threats that the Respondent would close the Grand Rapids plant if assembly employees voted for the Union.

As discussed above, I have found that immediately after the DiBiagio presentation, Dahlgren initiated a conversation with then assembly employee Lake, asked him what he thought of the meeting, and when he declared that he would not be "affected or influenced by fear," proceeded to tell Lake that "I'm 52 years old and I really don't want to have to start over. I worked other union . . . places . . . and when they came in we had to move on." When Lake told her that he had made up his mind and nothing she said would influence how he voted, Dahlgren said, "Well, I guess I'll move back to the Cities then." This suggestion that the plant would close—which is the direct implication of Dahlgren's comment that she will have "to move back to the Cities,"—is an unlawful threat under Gissel. This prediction of plant closing was not "carefully phrased on the basis of objective fact," and the suggestion was very much that Terex would take action to close the plant on its "own initiative unrelated to economic necessities." *Gissel*, 395 U.S. at 580–581.

As to Dahlgren's questioning of Lake's views about the DiBiagio meeting, whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House,* 269 NLRB 1176, 1178, enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the em-

[25] As the General Counsel points out, Ellis' assurances do not come close to meeting the Board's standard for remedying the prior unlawful statements. See *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

[26] These complaint paragraphs assert that in his weld/fab meeting Ellis "threatened the employees that the future of the Grand Rapids plant was dependent on the results of the June 25 election" (7(i)); threatened employees that he was the person who could move Respondent if he desired and that he decided where the Grand Rapids work was to be performed" (7(j)); "threatened the employees that the work at Respondent's Grand Rapids facility could be moved" (7(k)); and "threatened the employees that Respondent had other facilities that could perform its Grand Rapids work" (7(l)). The complaint alleges that at the assembly meeting Ellis "threatened the employees that Respondent had closed some of its facilities after employees chose union representation" (7(m)); "threatened the employees that Respondent had moved work out of some facilities after employees chose union representation" (7(n)); and threatened the employees that he decided where Respondent's work was performed" (7(o)); "Ellis threatened the employees that he could move work out of the Grand Rapids facility 'tomorrow' it he wanted to" (7(p)).

[27] "(q) During the [assembly unit] meeting . . . President Ellis further threatened the employees that selecting the Union was futile because Respondent would not negotiate in good faith with the Union."

ployee at whom it is directed so that he or she would feel restrained from exercising rights protected by *Section 7* of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In a context free of coercion and free of openly expressed hostility to the Union, this allegation would be less strong. However, given the spate of unfair labor practices contained in the DiBiagio talk, and given that the inquiry sought Lake's opinion on the unlawfully threatening meeting, there can be no doubt that a reasonable employee would have a tendency to feel coerced by having to appraise the DiBiagio meeting for supervisory personnel.[28]

As discussed above, I have found that in the days just before the assembly election, Dahlgren had a conversation with employee Broking, and a separate conversation with employees Clark, Payne, and perhaps Olson, in which she told them "If they get a union in here, you know, this place will close or move" and "if you guys do vote a union, they will close the place down and I don't want to have that go on." This was a repeated theme she struck with numerous employees, including, in addition to the above employees, with Lake, after the DiBiagio meeting, and with Esler, a few weeks before that.[29] She couched the suggestion of a plant closing in with a standard story she gave of an experience she had in the past where she worked at another employer's plant that closed after a union began to represent the employees. She told the employees that she did not want to start over and feared that the plant would close and this would happen if the employees voted a union into Terex.

These are unlawful threats. They are predictions of plant closing, not "carefully phrased on the basis of objective fact," and the suggestion is that Terex would take action to close the plant on its "own initiative unrelated to economic necessities." *Gissel*, 395 U.S. at 580–581. Dahlgren's comments constitute a threat of retaliation. I note that her sincerity is beside the point. Id. The mild manner of her delivery and couching of the threats as the relaying of a "personal" experience are also irrelevant. *Jordan Marsh Stores Corp*., 317 NLRB 460, 462–463 (1995). ("Regardless of the tone of his voice, what [supervisor] said . . . conveyed the threatening message that union activities would place an employee in jeopardy. Indeed, such advice, had it come from a friend sincerely concerned for the employee's job security, might have been all the more ominous"). The fact is, Dahlgren is an admitted supervisor of the Respondent who, along with some other supervisors, made a point of seeking out employees to stoke a fear of plant closing should the employees vote for a union. This is a violation of Section 8(a)(1).

Storlie

Complaint paragraph 7(s)

The General Counsel alleges that Storlie's conversation with numerous employees, on or about June 23 and 24, involved unlawful threats that the Respondent would close the Grand Rapids plant if assembly employees voted for the Union.

As discussed above, I have found that in the days before the assembly election, Storlie initiated at least two different conversations, with at least three employees, in which he told them that "he feared that the plant would move . . . if the union c[a]me in" (to Broking) and that if "the union comes in this place, they will shut it down" (to Clark and Payne, and perhaps Olson).

These were unlawful threats (*Gissel*, supra), which Storlie initiated and, according to Storlie, in at least some circumstances he "probably" reported back to management the names of the employees with whom he spoke.

These conversations were coercive, and unlawful, and appeared to be part of a systematic initiative by at least some supervisors to come into the assembly area in the days before the vote and threaten employees that the result of unionization could be a plant closing.[30]

Wake

Complaint paragraph 7(t)

The General Counsel alleges in the complaint that Terex's Wake repeatedly threatened employees with plant closing if employees voted for the Union.

As discussed above, I have found that no such threat was made in the one instance where it, or something like it, is alleged to have occurred involving Wake. Accordingly, I will dismiss this allegation.

Gill

Complaint paragraph 7(u)

The General Counsel alleges in the complaint that Terex's Production Control Manager Gill repeatedly threatened employees with plant closing if employees voted for the Union.

As discussed above, I have found that the evidence does not support the allegation. Accordingly, I will dismiss this allegation.

Hoeschen

Complaint paragraph 7(v)

The General Counsel alleges that Terex Manager Hoeschen unlawfully threatened Esler after the paint election when he came to her office "to clear the air." As I have found, on or a few days after June 26, when Esler came to Hoeschen's office and explained that he had voted for the Union in order to

[28] Of course, whether or not Lake was actually intimidated—he declared that he was not—is irrelevant. "It is well settled that the basic test for evaluating whether there has been a violation of Sec. 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Aid Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enf'd. 255 F.3d 363 (7th Cir. 2001). Accord, *Miller Electric Pump*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).

[29] Dahlgren's conversation with Esler is not alleged in the complaint or in the General Counsel's brief as an unfair labor practice and I make no finding in that regard. However, my finding that it happened does provide evidence that supports my conclusion that she made other very similar comments as alleged in the complaint.

[30] I have also found that Storlie had another conversation, post-election, with Brandon Rajala, over the telephone, in which he told Rajala that "Terex is not screwing around. We will move the plant." However, the General Counsel does not allege that conversation as a violation, and I make no finding regarding such.

"stick[ ] up for my guys," Hoeschen told him "We'll see how that works out for you," and as he was leaving told him "Good luck with that."

The Respondent argues that these comments are too vague to constitute a threat to retaliate. I cannot agree. Both comments, which I conclude were made sarcastically, were in response to and, therefore, in reference to Esler's explanation of his decision to vote for the Union. Her comments would be reasonably understood as a warning in response to an employee's declaration that he voted for the Union. See *St. Francis Medical Center*, 340 NLRB 1370, 1383 (2003) (finding supervisor's statement to employee distributing union literature to "be careful" was unlawful threat of unspecified reprisal and rejecting employer's argument that nothing tied it to union activity); *Jordan Marsh Stores Corp.,* 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats). The strength of this conclusion is compounded by the context, as the Board has noted that the context in which statements are made can supply meaning to expressions that would otherwise be ambiguous or misleading if considered in isolation. *Debbie Reynolds Hotel,* 332 NLRB 466, 475 (2000). In this case, the comments were made to Esler on the same day (or days after) that, for the first time since DiBiagio became general manager in February 2013, there were permanent layoffs of hourly employees in the plant, including the layoff of three of the eleven painters. Of course, Esler, the paint lead, was aware of the layoffs. In that context, the comments would necessarily have even more of a tendency to be reasonably understood as a threat than they would have been prior to his learning that there would be layoffs.[31]

Finally, I point out that the General Counsel does not seek a finding that Hoeschen's discussion with Esler before the paint election, in which she pointed at employee Gustafson and asked Esler how he was going to vote, or her conversation with Esler at around the same time when she asked him "how paint and undercarriages was going to vote," is an independent violation of the Act. (GC Br. at 33 fn. 15.) I note also that these incidents are not alleged in the complaint.

The General Counsel's additional allegations in his brief about unlawful questioning regarding union sentiments

The General Counsel contends on brief (GC Br. at 29–32) that there are several additional violations of the Act relating to individual supervisors engaging in unlawful interrogation of employees—primarily inquiring of employees whether they support the Union. There is some evidence for these, although some are disputed, and there is at least one other instance where a supervisor allegedly asked an employee whether another employee supported the Union and the General Counsel does not argue that this is a violation of the Act. The threshold difficulty with all of these is that they are not alleged in the complaint, and there has been no oral or written motion to amend the complaint to include them. The Respondent did not address them in its brief, and had no way to know that they were at issue. Further, the General Counsel does not argue that these are violations suitable to be found, though unalleged, because they were fully litigated and closely connected to the subject matter of the complaint. See *Pergament United Sales, Inc*., 296 NLRB 333, 334, enfd. 920 F.2d 130 (2d Cir. 1990). Finally, while some of these allegations involve instances where I have credited the General Counsel's witness over the Respondent's witness—they are not allegations admitted by the Respondent's witnesses. Thus, had the Respondent known that these allegations would be at issue, it might have presented additional or different evidence. For all these reasons, I decline to find any violations of unlawful interrogation that are not alleged in the complaint.

IV. THE 8(A)(3) ALLEGATIONS

The zinc pollution problem and the employer's plans to correct it

The Employer's painting of product parts involves a prepaint washing process in which the metal parts to be painted are washed with acids and cleaners in one of two wash bays within the paint area of the facility.

This process is thought to have caused an ongoing issue of zinc in excess of permit levels in the wastewater effluent coming from the wash bays. The problem has been longstanding, and was documented through sample testing conducted by the environmental consultant hired by Terex, Liesch Associates (Liesch), as far back as August 2008.

Liesch was unable to determine the specific source of the zinc discharge, although it was understood that it was coming from the wash bays and resulting from the wash process which was used on the parts to be painted.

In October 2011, Liesch reported the problem and the steps being taken to identify and solve the problem to the appropriate state agency, the Minnesota Pollution Control Agency (MPCA). By September 11, 2012, Liesch was recommending, "particularly due to the length of time that the facility has been out of compliance," that the Respondent combine the discharge from both its washbays and build a wastewater treatment system to solve the problem. Liesch proposed continuing to look

[31] I note that I do not rely on the fact that at the time Hoeschen made her comments, she knew that Esler was going to be terminated in less than 2 months. While this likely added meaning to the comments *for her*, Esler was not aware of the plan to terminate him, so that could not impact the tendency for the comments to coerce *him*. But he did know that there were permanent layoffs, and that is relevant context in considering the reasonable and likely tendency of the comments to coerce Esler when they were made to him. (Whether, after Esler's August 14 layoff, Hoeschen's June 26 comments to him then became even more likely to be coercive, is a question I need not answer given my conclusion that they violated the Act at the time made.)

I also note that the complaint (par. 7(v)) alleges that Hoeschen's threat was made between June 19 and 24. The evidence shows it was June 26 or a few days later. The Respondent was aware of and briefed the incident at issue. R. Br. at 43 ("The sole allegation concerning Joan Hoeschen is that she threatened an employee with unspecified reprisals between June 19 and 24. Respondent believes that this is a reference to a conversation between Hoeschen and Kerry Esler on June 26"). As the Board has explained, "Scrupulous adherence to **dates** alleged in a complaint is not necessarily required, and to do so here would elevate form over substance." *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1736 fn. 36 (2011) (citation omitted) (citing *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 461–462 (2010)), enfd. 594 Fed. Appx. 897 (9th Cir. 2014). I do not find the erroneous date an impediment to the finding of a violation.

for the source of the zinc (although Liesch was not optimistic about finding the source, or being able to do anything about it) through the winter and proposed planning to order the equipment for the wastewater treatment system in mid-March 2013. Its September 2012 letter attached a proposed schedule of compliance (SOC), negotiated with the MPCA, that would have the treatment system up and running by September 2013 at an estimated cost of $300,000 (although its letter to Terex indicated that it could be more or less ($225,000 to $400,000). By early 2013 the small wash bay's discharge had been combined with the large wash bay discharge point. This combination allowed for easier monitoring of pollutants and would simplify the treatment process for a wastewater treatment system.

In the summer and fall of 2013, Liesch was actively seeking bids and quotes for the cost of building a treatment system, in some requests for quotes calling it "a relatively fast track project" and stating that "timing is critical." During this period, Liesch consultants, Mike Johnson and Travis Knisley met with DiBiagio and Justin Fisher at Terex. At the meeting DiBiagio expressed concern that a wastewater system would generate hazardous waste, and expressed concern about the chemicals that would be introduced into the facility as part of the treatment system. For these reasons he was concerned about putting the treatment system in the existing facility. Liesch's view was that the sludge produced by the treatment would not be so contaminated as to qualify as hazardous waste, but it was not something it could guarantee. (GC Exh. 23(i); Tr. 211–212.)

This potential, and what turned out to be the size of the project, led Terex and Liesch to move towards a plan of building an addition to the facility to house the proposed treatment system, instead of trying to put it in the existing facility space. By November 2013, Liesch was writing to the MPCA on Terex's behalf contending that due to the complexity of treatment, the proposed treatment system had grown and, contrary to the original plan, would have to be built as an addition to the facility. Liesch advised the MPCA that "Terex is in the process of getting bids for building the addition to the facility and the plan is to have a contractor selected soon" and for "building to begin as soon as possible." However, no work on the facility was done and the onset of winter precluded construction. As of January 2014, Liesch was estimating that the wastewater system would cost Terex $250,000, in addition to $56,000 in fees paid to Liesch to for developing and designing the plan. Liesch wrote to the MPCA on January 16, 2014, explaining the delay and asking for an extension.

Liesch consultant Knisley testified that as of early 2014, the plan remained to move forward with the construction of the waste water system, presumably when weather permitted. In fact, by all evidence, Terex did not take any steps toward construction of a wastewater treatment system. As of March 31, 2014, Liesch and Terex were confronting an SOC proposal from the MPCA that would require installation and start-up of the treatment system by July 1, 2014, or face the prospect of paying fines. According to Liesch, this "deadline of July 1st is aggressive and will require significant effort to meet." As of April 7, Liesch was still working with Terex to get the SOC signed, asking whose name should be on the signature line for Terex and warning Terex that the MPCA was unlikely to permit further changes to the timeline.

In an April 16 phone call between Terex, Liesch, and the MPCA, we see the first manifestation of a change in the plan to deal with the zinc pollution. DiBiagio and Justin Fischer of Terex participated in this call. Johnson and Knisley represented Liesch. MPCA official Jaramie Logelin participated for the state. During this call, Terex proposed attempting to resolve the zinc problem through a combination of actions intended to lessen the creation of zinc discharge, instead of through building a system to treat the zinc discharge.

Terex's proposal for limiting zinc discharge included having the chassis, loaders, cabs, hubs, and pumps painted prior to getting to Terex, and the outsourcing of the fabricating and painting of all the "wheeled units" produced at Terex. In addition, there would be reworking of the ductwork to replace the galvanized zinc coating with stainless steel ducting. The wash spray was thought to be hitting the galvanized zinc and flowing into the wash bays and into the discharge increasing the zinc component of the effluent. In addition, the proposal included installing a hanging conveyer to transport parts through the wash bay, as the carts that were currently used to move parts through the wash bay were thought to be a source for the zinc. There was also a plan to reduce the volume of water being used which, in turn, would reduce the discharge levels. There was also a plan to possibly remove the phosphatizing process and find another chemistry option to do the washing that would lessen or even avoid the pollutant problem.

According to Knisley, DiBiagio indicated in this call that Terex's intention was to outsource. Logelin recalled that it was raised as an "option" during the call, but that "the main gist that they talked about" was whether it was possible to change the "chemistries" used in the wash process to a type and quantity that would remove the process from the regulatory definition of the metal finishing treatment category, thus easing the regulatory burden on Terex. Both options are referenced in Knisley's notes of the April 16 meeting and the concluding notes reference both as subjects for discussion in an upcoming conference call scheduled for April 30: "4/30/214 – Next call with the MPCA to discuss new chemistry options + painting alternatives."

That same day, April 16, DiBiagio held a town hall meeting with employees that included discussion of the waste water treatment issue. At the April 16 meeting, DiBiagio told employees:

> The WWTP, that's the Waste Water Treatment Plan. We, we do still have some high zinc readings coming out of our paint booths. What the EPA has requested is that we put in a waste water treatment plant that's going to cost about $400,000 to install, and probably about $3,000 to 5,000 a month to maintain. It also means bringing in chemicals that we really don't want to bring into this facility. It also means there is going to be a hazardous material generator from those chemicals. We don't want to be in that classification. So, we do know that there's still some things in there that go through there that have zinc in them. We've got to continue to pare that back so that it stops happening. We're also looking at getting rid of the spits and things because there is tin in the caster material.

> There's tin on the bolts, or there's zinc on the bolts, rather. There's zinc on the casters and we're still running the stuff through there. So, we're taking a look at what we can do. We're also looking to see what we can do to get out of the sodium phosphate altogether and use some other more environmentally friendly chemicals in there to get the acid wash, in lieu of the acid wash use something else. Because it's not just the cost of putting it in, it's once we get something that like in here, it's really not a good thing to have in a plant. We are looking at different ways to get things out.
>
> One of the things to eliminate the spits is to put in a hanging system, okay, to hang things on the track you go through like we do in the small booth and different things like that. Also, take a look at is there some of that stuff that we should be outsourcing and bringing other stuff in, so we might want to set that aside and get that rebalanced in such a way that we just eliminate the stream to start with, or significantly reduce the generation of all that. So, we're looking at all that; that is an issue right now that we are looking at.[32]

The follow-up conference call between Terex, Liesch, and the MPCA, on April 30, involved the same individuals as the April 16 call. DiBiagio discussed that Terex was "still investigating alternative chemistry options" with its current suppliers, with other Terex facilities, and possibly with new suppliers in an effort to avoid the regulatory limits that attached to its current use of chemicals in the wash. In addition, DiBiagio told the MPCA in this call that "Terex is working with outside suppliers to fabricate + powder coat parts outside of Terex." During the April 30 call, the parties agreed that a new schedule would be proposed to MPCA by May 7 that would contain a "schedule of milestones" and that would become a basis for agreement with Terex on when it would meet the permit pollution limits.

The new schedule was not submitted May 7, but a few days later, on May 12. On that day, Liesch, on behalf of Terex, submitted a proposed schedule of compliance tasks and completion dates to the MPCA.

The May 12 proposed schedule contained no provision for the building of a wastewater treatment system of the kind discussed in the past. Rather, "in order to bring their wastewater discharge into compliance," Terex proposed:

> (1) Terex is working towards having a rail system installed in the large wash bay. This will allow the parts passing through the wash bay to be moved without the use of carts. It is believed that the carts are contributing to the zinc levels in the wastewater discharge. Terex is proposing to have the capital approved and the equipment ordered by May 31, 2014.
> (2) As part of the modifications to the large wash bay Terex is replacing the galvanized duct work in the ventilation duct from the large wash bay. Terex is proposing to have the duct work replaced by July 1, 2014.
> (3) Terex is working towards outsourcing the painting of the loaders and chassis for their products prior to them arriving onsite at Terex. Terex is proposing to have all loaders and chassis painted prior to being received onsite by July 1, 2014.
> (4) Terex is also working on outsourcing the painting of preassembled parts, examples of these parts would be drive motors and pumps. Terex is proposing to have the outsourcing of these parts completed by July 1, 2014 as well.
> (5) As indicated above in [(1) Terex is installing a rail system in their large wash bay. The rail system will be received by Terex and installed by August 31, 2014.

The MPCA's immediate response to this schedule is not listed in the record. The next proposed SOC in the record is from July 1, with a cover note from the MPCA's Logelin to Terex stating that "hopefully you have been already implementing the corrective actions so I can simply add that the first two requirements have been completed. We need to get this agreement completed and in play as soon as possible as I am pretty sure this will be the last proposal that the MPCA will float past you." This proposed SOC, unlike the one from March 31, did not anticipate construction of a waste water treatment facility. Instead, it provided that Terex would:

> 1. Show that it had ordered a rail system for the large wash bay by June 30;
> 2. Complete replacement of all galvanized ventilation duct work in the large wash bay by July 1, 2014.
> 3. Complete installation of the rail system by August 31, 2014;
> 4. Attain compliance with all limits and monitoring by August 31, 2014;
> 5. Submit notice to the MPCA of completion of installation of the rail system and initiation of its operation within 10 days after completion.

Thus, this July 1 proposed schedule of compliance did not specifically provide for outsourcing, but rather, left it to Terex to achieve compliance through a combination of methods. As of the hearing in this case, the outstanding proposed SOC was dated October 1. It contained the same five requirements, with the dates pushed forward in each category, with compliance with pollutant levels required by December 31, 2014. As of the hearing this latest schedule had yet to be signed by Terex, and Terex had yet to bring its wastewater discharge into compliance with regulatory standards.

The termination and reclassification of employees

Under DiBiagio's leadership, the years of operating losses (2008–2012) since Terex purchased the Grand Rapids facility began to turn around in 2013. The operating profit in the fourth quarter of 2013 was just enough to offset losses from the previous quarters and leave Terex with a small profit for 2013. The

[32] DiBiagio coupled this message with assurances that while outsourcing and changing the mix of products made sense,

> while we're doing that, does it mean we're shutting all this other stuff down? No, it doesn't. We're gonna still be making stuff here. We're still going to be cutting. We're still going to be welding. We're still going to be painting stuff. . . . So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doin that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay?

facility continued to be profitable in January through April 2014, with operating profit increasing in each of these months.

There had been no mass layoffs of regular production floor employees at Terex since DiBiagio's arrival in 2013. There had been such layoffs at Terex in years past. The previous one before the ones at issue in this dispute occurred in April 2012, in the midst of the previous union organizing campaign, when approximately 20 employees were permanently laid off. More recently, at the end of January 2014 there was a layoff of some of temporary agency-supplied employees, but they were called back, and additional temporary employees hired in February, March, and April.

Instead of layoffs or terminations, Terex previously responded to a decline in weld/fab work in late 2013 and early 2014 with temporary transfers of employees. A decline in weld/fab work and an increase in assembly work resulted in the temporary transfer of two employees, a welder and a fabrication employee, to assembly in November 2013. In February 2014, this was done for three welders (one to accommodate his injury-related work restrictions) and two other welders were temporarily assigned to the test track. A fabrication employee went to assembly and another went to test track in February 2014, with the same arrangement. A fabricator was also sent to work in the warehouse. Those employees continued to be classified and paid the (higher) welding and fabricator pay rate, and they remained in these welder classification until some were caught up in the June 26 termination. The remainder had their temporary assignments made permanent as of July 7. According to Schultz, she and Hoeschen talked to these employees in January 2014 and told them of the transfers. Schultz testified that these transfers reflected the decline in SSL work when a major customer did not place orders for 2014.

As of April 16, 2014, DiBiagio was telling employees at an all-hands meeting that although there were going to be changes including outsourcing in order to increase the productivity of employees as the business continued to grow,

> It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. . . . So you're not in danger of losing jobs or anything like that, okay?

Similarly, in the June 10th all-hands meeting, that was largely devoted to DiBiagio speaking out against unionization, DiBiagio discussed the recent decline in orders that became pronounced in May and June:

> I just don't see any, any, positive in this [the union] at all. We've got a rough enough road as it is. We've lost $36 million in the last couple of years and we just barely got ourselves in the profitability side. Now our volume's down low enough we're gonna lose money here for the next couple of months. Okay, well that's just a business cycle. We gotta work through it. At end the end of the day, hopefully at the end of year we'll still be positive again. Okay, not by much, but we'll still be positive. We keep inching our way forward until we get the volume in this plant up to about 20-30 machines a day. That's where we really need to be to really start, really, really churning out good performance.

As to layoffs, as of June 10, DiBiagio, told the employees, "we haven't had layoffs since I've been here. I've been trying to avoid that at all cost."

Notwithstanding this, on June 17, the day before the paint election, Terex's Ellis approved a plan submitted to him by DiBiagio to permanently lay off three painters and seven weld/fab employees on June 26, the day after the upcoming assembly unit election. The plan called for three more painters to be permanently laid off on August 14.

Despite the exhaustive documentary and testimonial record compiled by the parties, there is little to no record evidence of any intent by Terex to lay off anyone until a flurry of activity in mid-June culminating in the approval by Ellis on June 17 to undertake the layoffs.

According to DiBiagio, he had verbally discussed the issue with managers in late May, although there is no corroboration for this from any witness, and I do not credit the suggestion that any layoff planning began in May.[33] DiBiagio testified that in June he started having "discussions"—"informal 'meetings' with various staff members, particularly Dallas Gravelle and Hoeschen, which were really conversations" in and out of offices on the subject that continued "on and off, over the next couple of weeks."

The first documentary piece of evidence suggesting any possibility of planning for layoffs is a June 2 email notice from Schultz calling a meeting of top managers (DiBiagio, Hoeschen, Dallas Gravelle, Lori Gill) for "Staffing Planning for all areas, given June's production rates and open slots." Schultz testified that it was a "brief" meeting "to discuss the lack of orders in June and going forward." Indeed, it is unclear if potential layoffs were even discussed at this meeting. Gill was listed as a "required attendee" for the meeting, however she repeatedly and unequivocally testified that "I was not part of the termination planning" and that she was not involved in any meetings in which the subject of terminations came up directly or indirectly. Schultz could not recall if Gill attended this meeting but recalled that in addition to herself, Hoeschen, Dallas Gravelle, Purchasing Manager Travis Antilla, and DiBiagio were present. In any event, Schultz, the only witness to testify about this meeting, stated only that at the meeting "there was concern that we may have to take some action regarding the staffing levels" but that no decision about whether action would be taken was made at the meeting.

After the June 2 meeting Schultz left on a personal leave and did not return until June 16. She testified that "[w]hen I returned to work, I understood that there had been further discussions and that we were going to have a reduction in force."

[33] There is also no record of this "contingency planning," in which, according to DiBiagio, because of his concerns in May about the potential to "be way over capacity going into July," he began "taking a look at what, at different levels . . . . this wasn't formal, this was my own thought process, of going through different levels of scenarios of orders. If we were at this level, what would we have to do? . . . . And started putting together contingenc[y] plans so we would be prepared if we had to make any adjustments in our capacity going into July." Without regard to DiBiagio's "own thought process" in May, I do not credit any claims that in May there was "contingency planning" in the sense of discussions or meetings in May regarding layoffs.

None of these discussions between June 3 and 15—when the decision to proceed with the layoffs was made—can be found in this otherwise comprehensive, indeed, exhaustive record.[34] No one involved explained what happened during Schultz' absence that resulted in the decision to proceed with the reduction in force, or in which meeting the decision was made. Gill unequivocally denied having any role in the terminations. Gravelle did not testify and no significant role, certainly no decisionmaking role, is attributed to him. Hoeschen testified extensively about her role, but it is limited to creating and perfecting the "matrixes" used to rate employees and justify which individuals were to be terminated.

DiBiagio is the general manager, but in his testimony he did not describe a decisionmaking role in the terminations, or provide an account of the meetings in which the decisions were made. Asked about his role, he answered in a manner that sounds assistive rather than managerial: "The role I played in the process was validating loading capacity, meeting that, validating where we were with orders, what it looked like in terms of what we need for capacity, and then beyond that it was—being that this was. . . the first layoff I was involved with, that I wanted to make sure that whatever process we used was a fair process."

If the order or decision for the layoffs came from corporate HR, or from Ellis, or from corporate counsel, or from somewhere else, it is unmentioned in the record.

Hoeschen testified that at a June meeting called to discuss a potential layoff—most certainly the June 2 meeting referred to above—she volunteered to use as a layoff tool a "skills assessment" matrix on the weld/fab employees that she had revised in February for the purpose of assessing employees' "cross training." The matrix contained the names of employees in the department and listed different job duties in the department. In February, Hoeschen had asked the weld lead employees (Jeff McCartney and John Madoll) to mark the skills in which employees were cross-trained. Hoeschen received that back and in the areas they had marked for each employee she assessed the employee for that skill with a 1, 2, 3, or 4, with 4 indicating "mastery of the area," a 3 for employees currently performing the listed duty, 2 if someone had previously worked in the area but had not been in it for a while, and a 1 for "not performing to tach," by which Hoeschen meant did not consistently meet standards. Hoeschen also volunteered that she could create a similar document assessing skills of the paint employees. She did this without any lead inputs and created a similar document with similar ratings scale.

Hoeschen testified that after the meeting, she took the weld/fab skills matrix and added columns indicating each employee's rank and their "RIF position." However, in later testimony, Schultz testified that she and DiBiagio added those items.

Hoeschen also created the second document for paint within a day or two, putting in skills assessment ratings for each employee for 12 areas or functions of the painting process.

Hoeschen's testimony suggests that the paint matrix was provided to DiBiagio and Schultz on June 17, around noon. Schultz testified that when she met with Hoeschen, Dallas Gravelle, and DiBiagio on June 16, they had a paint matrix to review. At the meeting they discussed "the number of people [to be terminated] and determin[ed] who of the number of people were going to be affected."

Gravelle, who did not testify, had prior experience supervising the paint area and according to Schultz he "weighed in" on the rankings. Later that afternoon, Schultz met just with DiBiagio in a series of meetings on the matrixes for weld/fab that had been supplied by Hoeschen. According to Schultz, it was in these meetings June 16 and 17, that "there were discussions as to the number of people [to be laid off] and determining who . . . [was] going to be affected." They reviewed this by "looking at the names that were on the list, looking at the skills rating, understanding what the work that was going to be remaining for the workers to do because of the reduction in orders particularly on the skid steer side, to make a determination who would remain to do that work." Schultz testified that the decision to release temporary workers had been made on June 16, and by the end of the day the weld/fab layoff matrix was "substantially complete" and listed the employees scheduled for layoff.

According to Hoeschen, she and Schultz met the afternoon of June 17, for about 15–20 minutes. Email evidence documents that at around noon, she had provided DiBiagio and Schultz the paint matrix. According to Hoeschen, Schultz and Hoeschen discussed the weighting that should be given to each of 12 functions/skills for purposes of scoring or ranking the paint employees. They agreed that Hoeschen's scoring would be used but that the scores for work involving the small paint booth wash bay should be emphasized or weighted, as more of the larger parts for which the large paint booth and wash bay were used were going to be outsourced over time. According to Hoeschen, Schultz then created a document on her own, and using Hoeschen's scoring and skill functions but with certain skills combined, and with certain skills weighted, and with seniority added in as a 13th factor. Schultz testified that she made these changes working together with DiBiagio on it. Together, they came up with the idea of weighting, or putting seniority in as a factor, but later that day Schultz and DiBiagio decided to remove seniority as a factor taken into consideration. She testified that she did this the afternoon of the 16th or possibly earlier in the day on June 17. Schultz knew at the time she and DiBiagio were creating this that three paint employees were going to be permanently laid off in June, and an additional three permanently laid off August 14, and they would be laid off in (reverse) order of their weighted scores. According to Schultz, these terminations were staggered because the Respondent "anticipated even more components coming in powder-coated throughout the summer."

The process was finalized June 17. Hoeschen described following the "normal" Terex reduction in force process of submitting the layoff information along with demographic infor-

[34] There is one email notice, establishing a meeting for June 5 with the subject being "Staffing Planning." Schultz is listed as the organizer but did not attend, she was out on leave. The others listed as attendees were DiBiagio, Hoeschen, Antilla, Gill, and Gravelle. Antilla and Gravelle did not testify. DiBiagio, Hoeschen, and Gill did not mention this meeting in their testimony. The attachment to the meeting notice is a list of upcoming materials scheduled to be received already painted.

mation to Terex corporate counsel Paul Smith for review. At 5:52 p.m. DiBiagio sent to Ellis, Fox, Smith, and Labor Counsel Charles Roberts, for review, "the 2014 Paint RIF plan and the 2014 Weld/Fab RIF plan." At 7:23 p.m., Schultz sent the same group, with a copy to DiBiagio, the "RIF spreadsheets and narrative, for your review and approval." At 7:47 p.m., DiBiagio sent an unidentified attachment to the same group, under the same subject line (2014 RIF). At 8:56 he sent an additional email, stating "Enhanced color contrast." At 9:03 p.m., Ellis replied to the same group with an email stating: "Jim, I have reviewed the plan to right size your business. I approve your plan and ask that you move forward with your plan."

This haste to have the terminations determined and approved was not normal and was not without cause. As Schultz admitted, Terex wanted these terminations determined prior to the painters representation election that was happening the following day at 1 pm. There was, Schultz agreed, a sense of "urgency about that." This made their efforts significantly more complicated, as it required the Respondent to assess in June, the level of business and progress in outsourcing anticipated for mid-August.

Moreover, an undated five-page "narrative" setting forth the motivation for the layoffs and the process by which the particular employees were rated, was submitted into evidence. Schultz testified that she wrote this on June 16 and 17, and that it was submitted to Ellis and the other recipients (DiBiagio, Ellis, Fox, Smith, Roberts) along with the "RIF spreadsheets" the evening of June 17. There was an opportunity for the recipients to comment and suggest revisions and Attorney Smith did so in a telephone call with Schultz. This narrative, which provides a comprehensive explanation of the rationale for the layoffs, and was obviously written with great care and, admittedly, with legal counsel's input, was motivated by the fact that, according to Schultz, "knowing that the elections were coming up . . . we anticipated there would be further issues following the activities." In other words, this document was written in anticipation that the layoffs, timed as they were, would be scrutinized and the subject of "further issues."

At the end of the process, on June 17, DiBiagio described discussing with Schultz, Gravelle, and Hoeschen that the layoffs would not be announced until the day after the assembly election—which would be June 25. DiBiagio testified,

> We had the Union campaign and the votes coming up. And we were very, very conscious of that, that we didn't want to do anything that could adversely impact, in any way, shape, or form, the integrity of these elections. . . . [W]e were concerned as, gee, is this one of those times where we really should not do anything, because we didn't want to create any kind of -- can I say "interference" one way or the other. And, you know, it could be misinterpreted or anything like that, so we elected to not make an announcement, even though we had the plan and we knew we had to do this, until after the last election was done.

These were, as noted, "permanent" layoffs. Schultz described them as "a permanent ending of the employment relationship."

As referenced above, on June 18, 2014, the painters unit employees voted 10 to 1 for union representation. The Union was certified as the collective-bargaining representative of the painters unit on June 25, 2014.

On June 25, 2014, the assembly unit employees voted. This vote went against the Union 22 to 15, with two ballots challenged by the Union which were not opened.

The evening of the assembly election, on June 25, Schultz notified the temporary agencies that the temporary employees would not need to return to work on June 26. In accordance with the plan developed June 17, early in the morning of June 26, Schultz, DiBiagio, Hoeschen, and Gravelle met with the employees who were being permanently laid off.

The seven weld/fab employees permanently laid off were Tony Knight, Tony Erickson, Vicky Burton, Rory Sisco, and Mike Kossow, Ryan DeBock, and James Baldinger. Of those, only Erickson, Knight, and Burton, all welders, were working in weld/fab. The four other terminated weld/fab employees (Sisco, Kossow, DeBock, and Baldinger) had been working in lower-skilled jobs in assembly, test track, or the warehouse since February 2014 (and in Sisco's case since November 2013).

These employees were told to come or brought to the front office where they met as a group with the managers.[35] Schultz did the talking, and told the employees they were being let go because work was slow. No other reason was given. Some of the employees were upset, declared that they were busy at work, and registered objections. Tony Knight announced to another employee being terminated, Vicky Burton, that this "had nothing to do with her and we knew why this was going on." The employees were taken through a severance package offered from Terex in exchange for releases, and then escorted off the premises.

A similar process unfolded with the three paint employees who were being terminated. Dale Persson, Dennis Feltus, and Jesse Schminski were brought to the front office.[36] DiBiagio, Schultz, Hoeschen, Gravelle, and Clem Moger were there. DiBiagio told the employees they were being laid off because "there were no orders; they were slow." No other reason was given.

Three additional weld/fab employees, welders Nick Roy and Chris Lessin, and fabricator Steven Pai, were notified that effective July 7, they were being reassigned to assembly and would henceforth be paid at assemblers' lower rates. One welder, Tony Wilson, who had been working in assembly since February 2014, was reassigned back into the weld/fab department. In addition, welders Jason Basker, Allen Rimmer, and Mike Willson, and fabricators Brandon Rajala and Larry Andrews, who had been working outside of weld/fab since February 2014 (and in Basker's case since November 2013) had their temporary assignments outside of weld/fab made permanent.

[35] DeBock and Baldinger were not present for the meeting.

[36] Esler was scored lower on the matrix. However, he was lead painter. Schultz testified that Terex determined they would need a lead painter at least until additional painting was outsourced over the summer, so Esler remained employed until the second round of paint terminations on August 14.

This resulted in a lower pay rate.

Rajala and Willson, who had been temporarily assigned to the test track in early February 2014, where they retained their weld/fab classification and pay, were assigned to test track at this time. Hoeschen and Schultz came to the test track shortly after the assembly election and told Willson and Rajala that they were being assigned permanently to assembly and the reclassification would result in them receiving the lower assembly wages.

The same day employees learned of the permanent layoffs, June 26, counsel for Terex, Charles Roberts, wrote to Union Counsel Jason McClitis, via email, regarding the "impending" layoffs in the paint department. In the letter, Roberts acknowledged that the Union was the exclusive bargaining representatives for the painters. The letter discussed the June 26 layoffs of paint employees and informed the Union about the planned layoff of three additional painters planned for August 14. Roberts wrote that the layoff decisions discussed in the letter were made prior to the June 18 election and thus, were not subject to bargaining as they predated the Union's designation as collective-bargaining representative. However, Roberts stated that Terex was willing to bargain, upon request, concerning effects of the layoffs. The letter went on to provide an extended explanation for the layoffs. It stressed a downturn in orders, and an increase in vendor-painted parts and consequent decrease in need for painting in-house as part of an effort to limit zinc discharge in the facility.

On August 14, as previously announced to the Union, three more painters were permanently laid off. This time, all the paint department employees were called to the office. The three employees to be terminated (Kerry Esler, Lee Kostal, and Rick Andrews) were placed in one room. The remaining paint employees stayed in another. DiBiagio, Schultz, and Hoeschen met with the three employees. Schultz told them they were being let go because of a slowdown in work. DiBiagio also said they were being let go "because of lack of work." Andrews, in particular, was upset and asked about the selection process. When he was told about the matrix he declared that he was an experienced painter and "I'm the best painter you got in the plant, and I think your matrix system's BS." Schultz went over the severance package. The employees were escorted out.

Analysis of the 8(a)(3) allegations

Introduction

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 233 (1963).

The termination of an employee that is motivated by union activities is archetypal unlawful discrimination under Section 8(a)(3). This includes situations of a general or mass layoff, where the layoffs or terminations were ordered to discourage union activity or retaliate against the union activity of some employees, but not necessarily the union activity of those who suffered the discrimination. "The General Counsel need not establish that the Respondent had knowledge of each discriminatee's particular union activity. It is well settled that unlawful motivation may be established when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group 'to discourage union activity or in retaliation for the protected activity of some.'" *Electro-Voice, Inc*., 320 NLRB 1094, 1095 fn. 4 (1996) (quoting *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985) and citing additional cases therein); *Birch Run Welding*, 269 NLRB 756, 764–765 (1984) (endorsing theory "that Respondent engaged in a general retaliation against its employees because of the union activities of some of its employees in order to frustrate all union activities, even though some of those employees caught in the retaliatory net were not involved in union activities"), enfd. 761 F.2d 1175, 1180 (6th Cir. 1985) ("the General Counsel may also prevail by showing that the employer ordered general layoffs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some. . . . [T]he theory can be valid even though not all union adherents were laid-off. . . The focus of the theory is upon the employer's motive in ordering extensive lay-offs rather than upon the anti-union or pro-union status of particular employees. The rationale underlying this theory is that general retaliation by an employer against the work force can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters").

The Supreme Court-approved analysis in cases, such as this one, turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *See NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In Wright Line, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). For instance, the Board has long recognized that in discrimination cases "the timing of the [employer's conduct] is strongly indicative of animus." *Electronic Data Systems,* 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *N.C. Prisoner Legal Services,* 351 NLRB 464, 468 (2007), citing *Davey Roofing Inc*., 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation, Inc*., 343 NLRB 43, 48 (2004); *Structural Composite Industries*, 304 NLRB 729, 729 (1991).

Under the Wright Line framework, "[t]he elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Williamette Industries,* 341 NLRB 560, 563 (2004); *Wright Line*, supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc*., 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the *evidence." Weldun International,* 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

As referenced above, on June 17, the night before the paint election, the Respondent finalized a plan to permanently layoff or terminate ten employees on June 26—the day after the assembly election—and to terminate three more painters on August 14. These terminations occurred as scheduled.

The General Counsel alleges that these terminations were a discriminatorily-motivated response to union activity, undertaken in violation of Section 8(a)(3) and (1) of the Act.[37]

The General Counsel further alleges that the July 7 reclassification of weld/fab employees Rajala and Willson, who had been working since early 2014 at the test track, was unlawfully motivated.

In addition, the General Counsel alleges that a decision in mid-May by the Respondent to outsource certain paint work—a move that the Respondent relies upon as one of two key justifications for its decision to terminate employees in June and August—was itself discriminatorily motivated, and a reaction to the union campaign.

The Respondent defends contending that the outsourcing and terminations were not motivated by antiunion animus, but instead, were the result of legitimate economic and business considerations and, in any event, would have occurred even in the absence of any union activity.

I consider these allegations below. I first review the initial decision of the Respondent to engage in additional outsourcing in the hopes of fixing its zinc problem, a decision that the General Counsel contends occurred May 12, and was part of a discriminatory plan but which I find was made somewhat earlier. I then consider the terminations, and the Respondent's defenses below, including its reliance on the outsourcing as a grounds for terminations. Finally, I address the General Counsel's claim that Rajala and Willson were unlawfully reclassified.

The decision to outsource (and take other measures) to control zinc pollution

Complaint paragraph 8(d)

The complaint contends that since on or about May 12, the Respondent has unlawfully outsourced paint department work in response to the employees' union activities and to discourage these activities. More specifically, the General Counsel contends that the Respondent's decision to move from a plan to build a waste water treatment system to treat zinc effluent to a plan to reduce the amount of zinc discharge by reducing activities that create the discharge, including outsourcing, was unlawfully motivated by the appearance of the Union.

I believe the evidence is compelling that the spring 2014 turn away from a plan to construct a waste water treatment system and to a plan to limit zinc in the effluent by a series of methods, including outsourcing, and other methods for controlling the zinc discharge, was not unlawfully motivated. That said, this conclusion does not answer the question of the relationship of the subsequent terminations and their motivation to the outsourcing. As originally conceived the outsourcing, along with other methods of limiting high zinc levels in the wastewater, was a way to avoid building the waste water treatment system while still satisfying the state regulators who were increasingly demanding a plan to solve the problem of excess zinc in the wastewater discharge. The original plans, as conceived, did not appear to anticipate or involve the need to terminate paint department employees. Only later, in June, as it made plans to terminate employees, did the Respondent rely on the excess zinc problem as a rationale for the terminations. In other words, while I reject the General Counsel's contention that the initial plan to move away from building a waste water treatment system to a solution that included outsourcing was unlawfully motivated, the question of whether outsourcing was the motivation for the subsequent terminations is a different question. I will consider that latter question below in a section of this decision concerning the terminations and the Respondent's defense to them.

As the General Counsel argues, it is certainly true that the zinc problem had gone on without resolution for years, even years before DiBiagio was on the scene. It is also true that the change in strategy from building a waste treatment facility to a plan including outsourcing surfaced for the first time with the state agency and Liesch, only on April 16, days after the Union first picketed. The formal proposal from Liesch to the state was sent Monday May 12, and the Union filed its petitions Friday, May 9. As noted above, timing is a well known indicator of animus.

However, it is surely relevant that, other than this timing, there is no other contemporaneous evidence of animus. And to attribute the switch from a plan to build a wastewater treatment facility to the appearance of the Union requires a belief in the nimbleness of the Respondent that would be extraordinary.

[37] As any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, any violation of Sec. 8(a)(3) is also a **derivative** violation of Sec. 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

This is an employer that did, indeed, gear up, to oppose the Union, but by all evidence it took some weeks for its strategies (lawful and unlawful) to develop.

Here, by April 16, the DiBiagio was clearly outlining in a call with the MPCA and Liesch, an intention to avoid building a wastewater treatment system. The new strategy included outsourcing among other efforts generally to reduce the amount of zinc discharge.[38] According to contemporaneous notes of a subsequent April 30 conference call, the MPCA asked for a schedule and timetable for this alternative plan to be delivered by May 7. Liesch did not make that deadline, but it was sent May 12. In all, I find the argument that the timing links the Respondent's decision to the Union less impressive than it might appear at first glance.

In terms of Wright Line, I think that even assuming, arguendo, that the General Counsel met his initial Wright Line burden based on timing, I would find that Respondent demonstrated that it would have moved to an alternative to the wastewater treatment system, to a plan that included outsourcing, even in the absence of union activity. Although the problem had lingered for years, the record evidence is clear that the MPCA was beginning to press Terex in the spring of 2014 to take action on the longstanding problem. Certainly, Liesch—which by credible testimony of Knisley and all evidence had no knowledge about the Union—evinced the belief that Terex could no longer delay and would need to show the MPCLA that it was addressing the problem after years of delay.

The General Counsel argues that the change to outsourcing followed years of Terex "devoting serious resources to the creation and construction of a [wastewater treatment process]," but I read the record differently. Terex had spent $56,000 in fees to Liesch, and combined the wash bay drainage pipes into one, but Terex had done and invested little else on a problem that had languished for years. I do not want to suggest that $56,000 is not a lot of money. But it must be kept in perspective. It seems to me that it bought Terex 18 months of avoiding the issue—one might call it footdragging. Clearly, long before the Union was on the scene, the record shows that Terex was in no hurry to build a waste water treatment system. As the Respondent argues, it is true that DiBiagio raised questions about the wisdom and appropriateness of a wastewater treatment facility solution for the zinc problem, as far back as the summer of 2013. But the string was running out, in the spring of 2014, without regard to the Union, the Respondent had to take action, at least enough action to satisfy the MPCA. For reasons unrelated to the Union, it had delayed and delayed beginning to build the long anticipated waste water treatment system. When it could delay the matter no longer, it changed plans, and would have done so even in the absence of the Union.

The General Counsel argues, and finds suspect, the fact that the outsourcing was not a certain solution to the zinc problem, while Liesch promised Terex that the waste water treatment system would solve the zinc problem. But Terex's immediate issue was not the certainty of fixing the problem, but rather, finding a plan that the MPCA would accept. And the MPCA did accept the alternative plan as a way to move forward. Noticeably, while Terex proposed outsourcing as part of the overall plan to reduce zinc discharge, the schedule of compliance proposed by the MPCA did not mandate any specific amount of outsourcing or even require outsourcing at all. Rather, its revised schedule of compliance (sent July 1 to the Respondent) required installation of a rail system in the large wash bay, replacement of galvanized ventilation duct work in the large wash bay, and then, compliance with discharge limitations by means unspecified. Thus, while outsourcing was proposed by Terex as a way to assist with managing the effluent problem, the amount and manner of outsourcing necessary to achieve compliance was left to Terex to determine. Outsourcing was one avenue among many—the goal was to reduce the zinc discharge including by reducing the volume of wastewater generally. If successful, the remaining wastewater would not exceed regulatory limits for metals.

The MPCA's acceptance of Terex's new plan indicates that, the General Counsel's skepticism about the science of the plan notwithstanding, this was a reasonable method of attempting to deal with the zinc discharge problem. While the testimony of the MPCA representative at trial was that the latest testing shows that Terex remains out-of-compliance, there is no suggestion that Terex is being fined or failing to continue to work to the satisfaction of the state agency to correct the problem.[39]

The other significant piece of record evidence is that Terex showed interest in the outsourcing of paint work before, in some cases long before, any overt union activity among its employees. The record evidence demonstrates that while the Respondent did not discuss the matter with Liesch, and continued to have Liesch develop the waste water system, it was, in fact, exploring outsourcing beginning in the fall of 2013. DiBiagio had Purchasing Manager Antilla and Hoeschen solicit quotes for painting to be done by outside vendors. Pursuant to these efforts, and after receiving some samples and evaluating them, Weisgram began supplying prepainted chassis to Terex for a larger-frame CTL machine in January 2014. According to DiBiagio, by the middle of February, Terex had received enough successful shipments of prepainted PT80 chassis that Terex then started, in March and April, moving forward to solicit quotes for prepainting of additional components. This, of course, was before any significant Union activity, and well before the time period for which there is evidence that the Respondent knew that the Union was interested in campaigning at Terex.

Finally, it is notable—and significant—that in his April 16

[38] Relying on the testimony of MPCA Official Jeremy Logelin, the General Counsel argues that the main focus of the April 16 conversation was not outsourcing but changing the chemical-mix to remove the process out of the regulated statutory sphere. But Logelin did affirm that outsourcing was an option raised. In fact outsourcing was one of a number of proposed methods advanced on April 16 by the Respondent as a way to reduce the zinc in the wastewater discharge.

[39] The General Counsel's certainty that the waste water treatment plan would have worked is overstated. It is based on a Liesch consultant Kinsley's explanation to the MPCA touting the success in sampling of its waste water treatment plan. But this is a far cry from certainty that the building of a waste water treatment facility would have worked in full-scale operation. Conversely, the alternative plan must have had some likelihood of achieving compliance, or the MPCA would not have approved a plan premised on it.

meeting with employees, DiBiagio spoke to employees about his misgivings about the waste water treatment plan that was still on the table with the MPCA and raised the subject of outsourcing as an alternative solution. Indeed, his talk to employees took place on the same day that DiBiagio had his conference call with Liesch and the MPCA. While the evidence of the conference call is based contemporaneous notes (and some testimony), and the evidence of DiBiagio's talk with employees is based on a recording of the talk entered into evidence, there is an accord between the two that cannot be disregarded. This is, of course, days after the Union handbilled the facility, but as discussed above, it is not believable that the Respondent moved with such alacrity to combat an inchoate campaign by coming up with a plan to outsource as a way to combat a union campaign that had just come to its attention. More probative, to my mind, is the fact that DiBiagio's discussion with employees on April 16 is fully consistent with the record and overall argument of the Respondent as to its decision on outsourcing and its timing.

Based on all of the above, I reject the contention of the General Counsel that the move away from building a treatment facility and toward outsourcing as one of many means of limiting zinc discharge was motivated by union activity. I do not believe that a prima facie case has been made. It rests solely on timing, which, for the reasons explained, I do not find compelling in these circumstances. Even putting aside the evidence that the Respondent was exploring outsourcing as early as fall 2013, and more aggressively in February and March 2014, it is clear that by April 16, it was openly eschewing the waste water treatment option and discussing outsourcing as part of a cluster of efforts that, together would likely reduce zinc emissions, or, at least, be acceptable to the MPCA. This date, which is after the Union had handbilled the facility, but still 3 weeks before any petition was filed, strikes me as too early to provide much of handle for the claim that the timing here is suggestive of animus. And there is no other animus in the record at this time that may be relied upon by the General Counsel to suggest an illicit motivation for the move to outsourcing and away from the waste water treatment system.

Having said that, even assuming a prima facie case, I believe that the Respondent has shown that for reasons wholly unrelated to union activity it decided to move forward with the alternative plan, which included outsourcing, as part of its attempt to solve the ongoing zinc problem. Again, the timing on this seems too early to say that it was decision dependent on union activity—it has proven that it would have done it even if the Union had not handbilled or otherwise announced its presence. Accordingly, I will dismiss this allegation of the complaint.[40]

I stress, however, that my ruling goes only to the General Counsel's allegation that (what he dates as) the May 12 decision to outsource was motivated by antiunion animus. This ruling does not resolve the issue of the lawfulness of the permanent layoffs decided June 17. The outsourcing was beset by difficulties, delay, and though a lawful move to make, did not simply or directly translate into the decision by the Respondent on June 17 to schedule the termination of painters and welders for June 26 and August 14. Indeed, in the very same employee meeting, quoted above, at which the DiBiagio informed employees about that outsourcing and other measures would be implemented instead of building a wastewater treatment annex, he assured employees that jobs were not in jeopardy because of it.

I will return to these issues below, as part of the consideration of the Respondent's defense to the allegations of unlawful termination.

The terminations

The General Counsel's initial Wright Line case

The General Counsel argues, and I agree, that he has met his burden of proving under Wright Line that the employees' union activity was a motivating factor in the Respondent's decision to terminate the employees on June 26 and August 14.

The Respondent first became aware of union activity after the April 7 leafleting by the Union. The seriousness of the Union's intentions and the breadth of employees' union activity became apparent by May 9, when the Union filed two separate representation petitions seeking an election among the painters and the undercarriage portion of the assembly employees.

In term of the Respondent's animus, it is notable that the Respondent's response to the Union campaign grew more vitriolic over the course of the campaign. While the Respondent's campaign in opposition began in April with mild exhortations by DiBiagio to employees ("make an informed decision is all I ask"), it increased in intensity as the elections drew nearer, at which time, perhaps not coincidentally, it had grounds to anticipate the victory the Union would receive in the painters election.[41] By early and mid-June, the Respondent's employee meetings were liberally infused with attacks on the Union and forceful explanations about why employees should not vote for the Union. As I have found, by June 19, the day after the painters election, and 2 days after the termination decisions were made, the Respondent's opposition to the Union manifested itself in starkly unlawful animus directed toward the entire bargaining unit by DiBiagio, and then Ellis, in addition to individual acts by other supervisors.

Under Wright Line the finding of this significant unlawful animus completes the General Counsel's initial Wright Line case. However, in this instance, the unlawful animus that began June 19, provides a particularly strong basis for inferring unlawful motivation for the terminations because it is closely bound in time and by perpetrator to the terminations.

Notably, the individual agents of the Respondent who exhibited the most potent antiunion animus at issue here are

[40] Given my ruling, I do not reach the Respondent's argument (R. Br. at 88–91) that the allegations regarding the outsourcing decision are barred by the statute of limitations.

[41] A few weeks before the paint election, the manager of weld/fab and paint, Hoeschen, berated lead paint employee Esler for being "passive" about the union campaign, interrogated him about his union sympathies and that of the other employees, and learned from Esler his view that 80 percent of the paint department was going to vote for the Union and 100 percent of the undercarriage employees were in support of the Union. Through this interrogation certainly, and I suspect, other avenues not articulated at trial, the Respondent was aware prior to the election that the paint department was heavily supportive of the Union.

DiBiagio and Ellis—the high ranking officials of the Respondent who only days before approved the plan to terminate the employees. In other words, this is not a situation where the agents of the Respondent responsible for the unlawful animus had nothing to do with the termination decision. To the contrary, they played a central and authoritative role in it.

Second, they did so at just the time they began to openly manifest their unlawful animus. Thus, the timing of the permanent layoff decision adds to the weight of the inference of unlawful motivation. As referenced above, the Board has long recognized that in discrimination cases "the timing of the [employer's conduct] is strongly indicative of animus."[42]

The context, of course, matters. As noted, under DiBiagio's tenure, there had never been layoffs of permanent production employees, until the ones at issue here. And the timing is even more suspect given that in months past (as discussed below) when orders slipped the Respondent went to great lengths to avoid terminations of its skilled and hard-to-hire painters, welders, and fabricators. Thus, the Respondent touted its efforts to keep everyone employed when it anticipated a downturn in early 2014, moving welders and fabricators temporarily into other areas of the plant rather than terminate them. And in recent months before the June decision to terminate, DiBiagio had told employees that layoffs were not on the horizon even as he saw the business ebbing after some unexpected and happily received months of profitability in the first quarter of 2014. (DiBiagio assured employees at his April 16 meeting, "you're not in danger of losing jobs or anything like that, okay?")[43]

Here, the termination decision was finalized on June 17, a mere 16 hours before the paint election and just 2 days before the Respondent's exhibition of open unlawful animus. Thus, the sudden permanent layoff decision—unprecedented since DiBiagio came to the facility—is extraordinarily closely timed not only with the painters election, and with union activity in general, but with the open shift in the Respondent's campaign from lawful to unlawful opposition to the Union.

In other words, the proximity of the termination decision to the exhibition of a spate of open unlawful animus that began June 19, heightens the inference that the decision is also a product of concealed animus. As referenced, DiBiagio's April caution to employees to "make an informed decision" gave way, as the larger Terex Corporation and their counsel became involved, to an increasingly vigorous antiunion campaign that spilled over into unlawful and blatant antiunion animus in the immediate wake of the painters vote. It is hard not to see the timing of the sudden layoff decision as part of this transformation of the Respondent's campaign from lawful opposition to unlawful animus. The inference can be drawn that the transformation from lawful to unlawful animus was brewing behind the scenes days before its June 19 unveiling.[44]

In addition to the evidence of animus and timing, the Respondent's implicit linkage of the terminations to the decision to unionize, through veiled references to the paint employees' upcoming terminations, adds further weight of the inference of unlawful motivation.

In his June 19 speech to assembly employees, DiBiagio said:

> Yesterday the paint department voted 10-1 in favor of the union. . . . They are claiming a great victory but I am not so sure they will be happy down the road with the decision they made. . . .
>
> I think the painters made a huge mistake yesterday. Time will tell but I think they made a big mistake
>
> I hope you all are smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of this business.

In his June 24 final speech to assembly employees, titled, "the Paint Department's Big Gamble," DiBiagio stressed that assembly workers should vote no and take the next 12 months to "see what happens with the Paint Department" after they voted for a union:

> You have the benefit of watching to see what happens with the Paint Department
>
> You can sit back and watch in real life what happens to employees who vote for a union . . . .
>
> If things go bad for the painters, you don't have to be in that same position.

On June 26, in response to Esler's explanation to her of why he voted for the Union, Paint Manager Hoeschen told him, "We'll see how that works out for you," and then as he left, told Esler, "Good luck with that."

The Respondent contends that these comments had nothing to do with the terminations but were implicit references to the vagaries and risks of collective bargaining. I reject that. It is improbable and unrealistic. The import of these comments may not have been understood by the listeners until June 26, when the terminations were publicly carried out, and in the case of Hoeschen's comments to Esler, not until his termination on August 14. But regardless of what employees knew, DiBiagio

[42] *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *N.C. Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing Inc.*, 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enf'd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation, Inc.*, 343 NLRB 43, 48 (2004); *Structural Composite Industries*, 304 NLRB 729, 729 (1991).

[43] It is also notable that the last mass layoff of production employees took place in April 2012, when approximately 20 employees were let go in the midst of the previous union campaign. Of course, it is not proven that those layoffs were discriminatory or unlawful in any way, but it is an observation that is relevant to assessing these layoffs, also decided upon in the midst of a union campaign. It is relevant to assessing whether the 2014 terminations were merely coincidental with the union activity or, rather, whether the timing suggests discrimination.

[44] Thus, I do not agree with the suggestion that the Respondent's animus turned on like the opening of a closed spigot only upon DiBiagio learning of the painters union victory on June 18. As I have found, while DiBiagio was clearly upset that the paint employees overwhelmingly voted for the Union, the result was not unanticipated—the Respondent had reason to know in advance that it was going to "lose" the painters election—Hoeschen asked and paint lead Esler told her.

and Hoeschen knew when they made these comments what was in store for the painters.

As the saying goes, you cannot unknow what you know, and DiBiagio and Hoeschen's statements must be evaluated in that context. I do not believe that it is reasonable to conclude that a manager, having scheduled the unprecedented termination of over half the painters unit, the day before an election (as to which he knows the likely outcome), and who 2 days before the terminations begin tells employees "watch in real life what happens to [painter] employees who vote[d] for a union," is not referring to the upcoming terminations.

Once one rejects, as I do, the Respondent's contention that the comments were references to the vagaries and uncertainties of collective bargaining, but rather, to the coming terminations, the comments are revealing of the motivations and mindsets of DiBiagio and Hoeschen. The comments suggest that in their minds, the coming terminations were linked with the decision to unionize.

It is not that these statements directly prove an unlawful motive for the terminations. It is logically possible (but not necessarily reasonable) that a nondiscriminatory decision to terminate the painters was seized upon by DiBiagio after the fact to announce that employees should watch and consider the fate of those who unionized. But the inference that the terminations were a product of unionization is readily drawn. DiBiagio and Hoeschen drew the link for us. Their comments are revelations, a window into DiBiagio and Hoeschen's understanding that the terminations were related to unionization.

In sum, the General Counsel has proven his prima facie case under *Wright Line*. There is union activity, there is employer knowledge of it, and there is animus. The animus is found not only directly in the multiple threats in violation of Section 8(a)(1) by the top management responsible for the termination decisions, but in addition, is inferred from the suspect timing of the Respondent's termination decision, as well as DiBiagio and Hoeschen's implicit references to the terminations being related to the decision to unionize.[45]

The Respondent's Wright Line defense

Having found that the General Counsel has proven that the employees' union activity was a motivating factor for the employer's adverse employment action, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the union activity.

The Respondent contends that just that. It contends that the terminations on June 26 and August 14 would have occurred even in the absence of union activity at the plant.

In support of its position, the Respondent advances two explanations for the terminations, or more precisely, one explanation for some of the terminations and one explanation for the remainder.

The Respondent contends (R. Br. at 109–110) that the termination of four of the painters (one on June 26 and two on August 14) and two of the weld/fab employees on June 26, was the result of its decision to outsource certain painting work in an effort to solve its excess zinc problem.

Second, the Respondent contends that the remaining terminations (two painters and five weld/fab employees on June 26) were attributable to a general decline in business, particularly a sharp decline in orders of SSL machines.

In evaluating the Respondent's explanation for the terminations, the Board does not sit to judge the efficacy or appropriateness of legitimate nondiscriminatory business choices made by an employer: "Whether procedures other than a layoff might have been more a or equally effective in remedying the Respondent's economic loss is not a matter the Board is empowered to decide. The Board's authority to evaluate the Respondent's business conduct extends only to the determination of whether the conduct is discriminatorily motivated or otherwise in violation of the Act." *Gem Urethane Corp.*, 284 NLRB 1349, 1350 (1987).

At the same time, the credibility of the Employer's asserted motive is at issue. In considering the Respondent's evidence, it is important to remember that for an employer to meet its Wright Line burden, it is not sufficient for the employer to prove that there existed a legitimate basis for the permanent layoffs, or to show merely that this legitimate factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it is the Respondent's burden to "persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun International*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). In other words, in light of the General Counsel's case, it is inadequate for Terex to demonstrate just that it had a sound legitimate economic grounds to which it could attribute the termination decision. It must prove more than that. It must prove that the economic grounds actually motivated it to the extent that even in the absence of union activity it would have undertaken the same terminations. See *NLRB v. Transportation Management Corp.*, supra (approving Wright Line and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

Considering all the circumstances, I believe that the Respondent has failed to prove that it would have taken the same adverse employment actions in the absence of union activity.

Declining business as a motive for the terminations

The Respondent argues that it terminated two painters and five weld/fab employees on June 26, because of a decline in production orders, particularly a sharp decline in orders for SSL machines. The Respondent argues that it would have made these termination decisions even in the absence of union activity.

[45] The Respondent argues that the fact that it withheld announcement of the terminations until after the elections renders implausible a theory that the terminations were ordered to influence the outcome of the election or to punish employees after-the-fact for supporting the Union. But as I have found, the Respondent had reason to know at the time it ordered the terminations that the painters union, at least, was likely to go union. A motivation for the terminations that involved sending a signal of the "gamble" and "mistake" of unionizing to all employees—painters, assembly, and particularly other groupings of employees who might be considering following the painters lead—is entirely plausible and entirely unlawful.

I do not believe that the Respondent has proven this. Significantly, the terminations are inconsistent with its previous actions to preserve jobs during other financially difficult periods that preceded the union campaign. This effort to avoid terminations or even temporary layoffs is something that DiBiagio expressed commitment to, as late as April 2014. But for reasons unexplained, this time it was different. Moreover, even accepting that the Respondent could have viewed the financial situation as warranting layoffs, DiBiagio's express conflation of the Respondent's view of its financial situation with the costs of its anti-union campaign directly undermines the Respondent's efforts to prove that the financial situation would have resulted in the same terminations even in the absence of union activity. Finally, while the record exhaustively explains the manner in which the Respondent went about creating a ranking of painters and weld/fab employees to terminate, an account of the decision take the unprecedented (under DiBiagio) step of conducting mass terminations is suspiciously shielded from view. It is true that DiBiagio testified about his view that layoffs were necessary. It is true that after the decision was made, Schultz and Terex counsel wrote a narrative and a letter justifying the decision. But the contemporaneous decisionmaking process is oddly absent. We know that the Respondent felt it "urgent" to make a decision on the terminations before the painters election and rushed to do so. Whatever its reasoning for this "urgency"—which is unexplained—the absence of any contemporaneous account of the decision to terminate—in an otherwise detailed record—weighs against the Respondent's effort to contend that its decision to terminate employees would have been made in the same way in the absence of union activity. *ManorCare Health Services*, 356 NLRB 202, 228 (2010) (employer's Wright Line burden requires it to prove "it would have taken the same action against" employees in the absence of union activity) (Board's emphasis), enfd. 661 F.3d 1139 (D.C. Cir. 2011).

At least since the last union organizational campaign in 2012, Terex, notwithstanding ongoing financial challenges, had not seen fit to terminate any permanent rank-and-file employees. DiBiagio, in particular, had touted his efforts to avoid terminations, and had done so as recently as April 2014, before the Respondent was evincing alarm about the rumors of union activity, but after the declining financial picture that it had been preparing for since January had come into view. Indeed, over the many months of ups and downs since 2012, the Respondent stood firm and made no move to terminate any of its permanent employee complement—until the night before the first union election.

The Respondent was no stranger to financial ups and downs. From the time of the purchase of the facility in 2008 through and including 2012, the facility consistently maintained operating losses—as much as $21 million in 2009, and slightly more than $8 million in 2012. DiBiagio was hired in 2013 with a mandate from Ellis to turn the facility around. DiBiagio made great strides in this regard. He made changes to management, reduced excessive overtime, and made organizational changes with the result that in the last quarter of 2013, Terex earned an operating profit of $1.4 million which offset losses in the earlier quarters to put Terex in the black for 2013. This profitability, to the surprise of Terex, continued into 2014, with monthly operating profit increasing every month from January through April, when it reached $422,000. The year had begun better than predicted in the Respondent's budgeting, and on April 16, DiBiagio told assembled employees that "April should be pretty close to March, much higher than we thought." In May the Respondent was "in the black" $111,000 and sales again exceeded the forecast.

Notably, the comparison of monthly income from operations and monthly operating profit as a percentage of sales, for the first three quarters of 2013 and 2014, shows that 2014 compares favorably with 2013, including for the summer months. The losses in the summer of 2013 far exceeded the losses in 2014, but there was no rush to layoff, or any layoff at all of permanent employees.[46] One more metric: 2013 actual net sales for the first three quarters equaled $89,820 in hundreds of thousands of dollars. The same figure for 2014 equaled $85,259. This decline is minor and well within norms. Again there was no loss of employment in 2013.

Ignoring income and profit, and turning to production, there is no question that 2014 was a slower year than 2013. Production was down in 2014, but this was anticipated and built into the Respondent's models, but again, no hint of or discussion of terminations until just before the union election in June.

In 2013, 2323 machines were shipped for the year. In Terex's original forecast for 2014, begun in mid-2013, the forecast called for 2523 machines to be built in 2014. (GC Exh. 59(e) at 8.) However, by mid-September 2013, the forecast for 2014 had been revised downwards significantly and now anticipated that 1639 machines would be built in 2014, a forecasted decrease of over 35 percent. By December 2013, the step 3 S&OP 2014 level load forecast was up slightly to 1,851 machines (GC Exh. 59(h) at 5) but still far below 2013 numbers.

[46] First line: Income from Operations (Scale ($000's).
Second line: Operating Profit as a percentage of sales

2013		2014
Jan	-292	205
	-3.2%	2.2%
Feb	135	262
	1.3%	2.7%
Mar	221	329
	1.9%	3.0%
Apr	237	422
	1.9	4.0%
May	-394	111
	-3.8%	1.2%
Jun	-508	-347
	-5.6%	-4.3%
Jul	-335	38
	-3.8%	0.5%
Aug	-348	180
	-4.0%	1.9%
Sept	-144	-384
	-1.6%	-3.9%

Notably, the 2014 projections from September 2013 (1639 machines) that resulted in zero layoffs or plans for layoffs of permanent employees in 2014 far exceeded the 2014 step 3 S&OP production forecasts for mid-June (1884 machines), mid-July (1824 machines), and mid-August (1870 machines). And the December 2013 forecast of 1851 machines to be produced in 2014, that also resulted in no terminations, is comparable to the forecasting in June, July, and August, that is the alleged basis for the significant terminations in the summer of 2014.

In this regard, throughout the first three quarters of 2014, the annual production forecasts remained relatively steady. By mid-February 2014, the step 3 S&OP forecast is down to 1779 machines for the year 2014. In mid-April the same forecast for 2014 is for 1878 machines to be produced. (R. Exh. 18 at 4.) Looking at all machines, as of mid-May 2014, the Respondent's (step 3) level load forecast for 2014 forecast was that 1902 machines would be built for the year. The mid-June (step 3) level load forecast for 2014 was 1884 machines. (R. Exh. 36 at 4.) In mid July (step 3) the level load forecast was 1,824 for 2014. (R. Exh. 41 at 4.) In mid-August (step 3) level load forecast for the year was 1870 machines. (R. Exh. 42 at 3.) By mid-September it was 1708. (R. Exh. 43 at 6.)[47]

In terms of the Respondent's characterization of its production situation in the summer of 2014, it is also important to note that the production of undercarriages for Caterpillar, which the record demonstrates requires significant painting, welding, and fabrication work, far exceeded the numbers for which Terex had budgeted. Thus, while going into 2014, Terex had budgeted to build 1500 Caterpillar undercarriages for 2014, Caterpillar's forecast continued to grow (see R. Exh. 17, 43; Flash Reports at GC Exh. 84–90; R. Exh. 50), and it is clear that the actual numbers produced in 2014 were going to be approximately 2062 (December 2014 actual results were not available at time of hearing). Notably, Caterpillar's actual and forecast demands were higher than Terex budgeted throughout the year—and even as of June 4, 2014, Caterpillar was predicting a demand for 2146 undercarriages, up from 1866 in March. It is unclear how, if at all, this dramatic uptick figured into the Respondent's labor plans, but it might go a long way to understanding the consistent and unrebutted testimony from testifying painters and weld/fab employees that the summer of 2014 was a busy one.[48]

The most dramatic production drop—both in plan and actual—is found in the fall off of SSL production in 2014, and particularly in the summer of 2014. Terex had been producing SSLs for only 4 years. Its "legacy" product was the CTLs, and by comparison, even when SSL orders were strong, Terex produced about 4 times the number of CTLs than SSLs. Still the SSLs were an important part of the product line. But the decline while severe, was not new, and had begun many months before. Like production generally, from the beginning of 2014, SSL production was down in 2014 from 2013.[49]

SSL backlog fell sharply in June. At the beginning of June, there was only a backlog of eight SSL units to build. By June 11, the schedule had been raised to 17 SSLs to be built in June. Interestingly, the Step 3 S&OP level loading for mid-June called for only 12 SSLs to be built in June, but called for 33 to be built in July, 30 in August, and 32 in September, all numbers (with the exception of June) that were completely in line with what the S&OP reports had been showing since mid-March, at a time when there was no talk of layoffs. Indeed, in his April 16 speech to employees, DiBiagio noted that "[w]ith the skid steers . . . . We're not moving them. Out there in the field we're not moving at all," but, in reference to the decline in SSLs, DiBiagio told the employees, "It's no big deal. Personally if we make a track machine or skid steer it doesn't matter, as long as we've got enough to go around to everybody."

It must be remembered that until June 2014, with union elections upcoming, there was no talk of terminations or layoffs. Indeed, DiBiagio was offering assurances to the contrary to employees in April 2014.

In late 2013 and early 2014, how did the Respondent respond to the anticipated and actual downturn in production? Not with terminations. Two weld fab employees were transferred to the

[47] In its brief the Union (CP Br. at 43) makes the same point, using the yearly forecast of machine production in effect at the beginning of the month and based on the final step 5 S&OP figure available at the close of the preceding month (Tr. 1504–1505):

	Jan '14	Feb '14	Mar '14	Apr '14	May '14	Jun '14	Jul '14
Yearly Forecast	1866	1882	1812	1843	1911	1844	1811
Exhibit	CP 5(a)	CP 5(b); GC 59(i)	CP 5(c); R 17	CP 5(d); R 18	CP 5(e); R 26	R 36	R 41

[48] Paint lead Esler, who was terminated in August, testified that work remained busy throughout the summer months in the paint department (in the small booth "[t]hey can hardly keep up") despite a decrease in SSL production. Painter Steve Kruk testified to being busy through the summer and that he was a little bit busier after the June 26 layoff than before because of the loss of coworkers to the layoffs. Painter Rick Andrews, who was terminated August 14, testified that he was so busy before his termination that "[t]here wasn't time to hardly get a drink of water." Lee Kostal, who was terminated August 14, and worked primarily in the large paint booth, testified that in the period before the June 26 termination work was "pretty steady" and "I didn't really notice any kind of reduction in work." Kostal also testified that after the June terminations "we were busy. Real busy. We had less people," and that work "actually picked up after the June 26th terminations" because of the large amount rail work to be performed for the Caterpillar undercarriages (which had increased in orders beyond projections). Welder Tony Knight, terminated on June 26, testified that while Schultz told him and others that they were being terminated because there was a slowdown in work, in fact, "I was not slow at all." Assembly lead Nick Baker testified that the work level in assembly remained high and steadily increased through the summer. The employees' accounts of their busyness throughout the period when the terminations occurred are unrebutted in the record.

[49] An average of 80 SSLs per month in the second and third quarters of 2013 fell to an average of 61 SSLs built a month in the fourth quarter of 2013. By mid-November in the step 3 S&OP report the "level load" forecasting was anticipating 48 SSLs to be built in January 2014, 43 in February and 47 in March. This anticipated production declined further in December to 32 anticipated for January, 29 for February, and 32 for March. As anticipated, the Respondent built 37 SSLs per month in the first quarter of 2014, significantly less than in 2013.

assembly area in November 2013, and a total of ten fabricators and welders were temporarily transferred out of weld/fab in February. (One, Mike Kossow, as an accommodation for an injury.) Some temporary employees were also let go in January and February 2014, although an improving outlook resulted in additional temporary employees being hired, including in weld/fab in February through April. But there were no permanent terminations, or even temporary layoffs of regular employees.

The truth is, until the June 2014 decision to terminate employees, the Respondent, under DiBiagio, had gone to some lengths to avoid layoffs. In December 2013 or January 2014, DiBiagio told employees that orders were "very, very light, and unless it improved we could be looking at a shutdown at the end of the month." It proved unnecessary to have the shutdown, but this plan to have one was for the purpose of avoiding permanent layoffs. As DiBiagio reminded employees during an April 16, 2014 town meeting, in January and February 2014, facing negative financial projections, he had been prepared to close the plant for one week in January and one in February to avoid permanent layoffs:

> This month [April] should be pretty close to last month. April should be pretty close to March, much higher than we thought. Remember when we had talked about back then about almost considering having somebody to take a week out in January or a week out in February because the projection was so low? We didn't want to go ahead and permanently layoff anybody, so we just said, why don't we take some time out and ride the storm so to speak. Well, we didn't have to do that. We got enough in. Didn't set any world records as far as what we booked, but it was enough to keep us all going. So we didn't have to do anything like that.

As late as June 10, 2014, in a meeting with employees, DiBiagio was comparing the current situation to January and February:

> We had less work than we had people. We had more people than we had work. But just like we did back in January and February, we're gonna ride the storm to get us through other things and the way we're going we can still come out ahead and we did."

This effort to avoid permanent layoffs was not just kindness. HR manager Schultz admitted that "[i]t's been a challenge" to find welders, and agreed that "it would be wise" to retain experienced welders, even if it meant transferring them to a lower-skilled assembly job for a while. And, in fact, in November 2013, and January and February 2014, this is precisely what the Respondent did, transferring weld and fab employees to assembly and other lower-skilled areas of the plant, even while continuing to pay them the higher weld and fab pay rates. These sentiments were also expressed by DiBiagio, who testified that the lack of available welders and painters in the local job market limited the production potential of the plant:

> The availability of the work force. We're in a very small town and there is limited skill sets, because there is limited people, and for us to double or triple our volume it would be very unlikely that we would be able to recruit a work force that could support that in some of the areas of the plant. . . . There's a lot of competition for welding in this area. And there's a limited number of welders available.

Asked about the ability to hire painters, DiBiagio added: "It's very difficult to hire painters, yes."

DiBiagio expressed these same points to employees in his April 16 town hall meeting, as part of his explanation to them of why outsourcing some work (while "insourcing" other items) would not hurt their employment prospects, telling employees that expansion of the plant was a goal, but that the goal was limited in large part by the difficulty in finding qualified welders and painters:

> Two things, and I know a lot of you guys that are in here, and again I just tell it like it is. We have a very, very, very, very slim chance of ramping this plant up to 25 to 30 machines a day and think that we're going to be able to make all the chassis and motors and paint everything. Right now, we barely have the capacity to do that, to do what we need to do. It's very difficult on a lot of our qualified welders. We have a lot of good welders on staff. You guys do an awesome job, but imagine trying to get three to four times the number of folks that we have today. We just can't find the people, okay it's very difficult.
>
> Same thing in paint, we've got some great guys in paint. But to think that we can quadruple the staffing in there and get four times the number of people and run two shifts, three shifts, five days a week, whatever, but we just can't find it. So, we gotta start planning to say, okay, how are we going to ramp up to these levels of 25-30 machines a day and be successful. . . . We can grow it bigger and bigger and be a whole lot better and not fall on our face in the process. While we're doing that, does it mean we're shutting all this other stuff down? No, it doesn't. We're gonna still be making stuff here. We're still going to be cutting. We're still going to be welding. We're still going to be painting stuff. But, I don't think that we're going to be able to expand paint and expand our welding capability up to that 25-30 machines a day kind of a level and look at us when we're trying to do five a day, six a day, seven a day. We really, really struggle. So, we'll do what we can. We'll play into our core competencies. We'll do what we do well and exploit that and not get too deep into stuff that we don't do as well. It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doing that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay? [time stamps omitted].

Two months later, in the midst of the unionization, for reasons unexplained, but suspect, the Respondent did not make any effort to hold on to the six painters and ten weld/fab employees, notwithstanding the fluid and changing nature of its production levels and notwithstanding the lack of skilled employees in the local job market. Notably, the General Counsel

is not alleging that there was no economic downturn for the Respondent. And he is not alleging that the Respondent could not react to it. Indeed, with the exception of Rajala and Willson, discussed below, the General Counsel does not challenge the Respondent's reclassification of weld/fab employees to other jobs in the plant. The Respondent moved employees in the past when it suited its production needs, and it did it in June 2014 as well. But what the General Counsel is challenging is the unprecedented move to terminate 10 employees, including seven weld/fab employees, four of whom had not even been working in weld/fab for many months at the time of their termination. In short, the General Counsel is not alleging that the Respondent was barred from making adjustments to its work force and operations. Rather, it is the unprecedented and rushed move for DiBiagio to terminate employees on the eve of the union elections that is challenged as discriminatory when recent history would dictate that it would transfer key personnel—personnel that the Respondent admittedly had trouble finding in the local job market—to other jobs in the facility.

Overall, the salient issue can be boiled down as follows: was it, in fact, as the Respondent claims, coincidence that for the first time since DiBiagio took over at Terex, that the Respondent reacted to negative economic trends by ordering permanent layoffs at the very time that the union drive had reached its apogee? I think it is unproven, at best.

Indeed, even if we assume that the Respondent could have look at the financial numbers and decide that, based on financial prospects, it wanted to terminate employees in response, its argument is considerably compromised by the evidence that at the very time when it was formulating its plans for the terminations, it was telling employees that the union activity was hurting it financially.

On June 10, 2014, in his speech to employees, DiBiagio reports that May was another profitable month but that the backlog was down and "Our outlook for the next couple of months is getting light . . . [and that] [t]he projection for June in terms of profitability is that our roll is going to end . . . . [and] just with lower production, we'll probably lose about $168,000." Combined with a delay in Caterpillar orders, "just shy of $200,000 we're probably lose this month because of low orders." DiBiagio quickly added that

> Another thing impacting that is that nothing is free. . . . The union campaign has probably cost us almost $100,000 already. We've got 50 that came out of this, so we would have been at about $160,000 and it's probably going to be somewhere between $50-75,000 again in June. . . . So that's an added costs and we'll be carrying that cost probably for a little bit.

In that same June 10 speech to employees, DiBiagio then turns his attention to convincing employees not to support the Union. He warns employees, with regard to the Union: "I'll tell you what, when I came here I made a commitment that we are going to turn this place around . . . and this [the union drive] is really gonna get in the way. It's gonna probably take steps back financially and that and so it's already happened. That's going to continue." DiBiagio continued with this theme in his June 10 speech:

> So I mentioned, whatever comes out, whatever goes up, something else has to go down. These are all cut from the same pie. If you cut one piece bigger, then next piece is gonna be smaller. It's like squeezing a balloon. The same amount of air in it, if you squeeze it, one side is gonna be bigger, one side is gonna be smaller. The total there's an issue. So now, I gotta figure out how we're gonna offset the cost of going through this [union] process. I've already got $150,000 I've got to come up with now to pay for legal costs. What we've gotta do is (unintelligible).... So we've got that (unintelligible) ... make sure we ensure building availability business. So anyway, that's what I'm trying to talk to you folks about the realities of it. [ellipse in original transcript]

The issue is whether the Respondent has proven that its termination decisions—which it argues were based on the financial situation of the facility—would have been undertaken in the same way at the same time even in the absence of union activity. And yet, at the very time that the termination decisions were being made by management, DiBiagio is admitting that the union activity—specifically, the Respondent's response to it—is a hindrance to the Respondent's financial situation and to the prospects of the facility. At this very time that the Respondent is relying upon the financial prospects to justify terminating employees, in the Respondent's own words, the financial outlook has been adversely affected by its response to union activity at the plant. Given this, I do not think it is reasonable to conclude that the Respondent has proven that it would have undertaken the terminations for financial reasons even in the absence of union activity.

Finally, I note an important difficulty with the Respondent's effort to prove that its motivation for the terminations was a benign and economically unavoidable result of a business downturn. The fact is that when the record is parsed, for all the paper in this case, for all the testimony by Hoeschen, DiBiagio, and Schultz, about how the matrixes were developed and used to select the individual employees for termination, for all the economic and operational data charting the decline in orders testified to by Gill (but who avows she played no role in the termination decision or discussion), the actual contemporaneous process for the decision to order terminations is conspicuously shielded from view.

For example—with regard to the process for making the decision to terminate the employees—there is a meeting on June 2, at which no decision is made and at which, it appears that the prospect of layoffs is mentioned for the first time. Then the record essentially goes dark—until Schultz returns from her leave June 16—at which time she "understood that there had been further discussions and that we were going to have to have a reduction in force." Schultz then picks up the story with detailed testimony, joined by Hoeschen, of a series of meetings at which the matrixes were perfected, the timing, number and names of employees to be terminated determined, and then sent to Ellis for final approval, a matter rushed to make sure it was completed before the painters election. In the context of this carefully, indeed, exhaustively litigated case, the vagueness of the actual decision to move forward with terminations is striking. It means, for example, that the lengthy narrative document

created by Schultz on June 16 and 17, which contained recitations of the economic motivations for the terminations, and which was created in consultation with counsel and with an admitted eye toward the scrutiny the decision would generate given its timing, is based on what Schultz was told after-the-fact.

In an otherwise precise account of event, we do not know with any specificity, who or when, or in what meeting or format, the unprecedented (under DiBiagio) decision to terminate employees June 26 and August 14 was made. The most the record shows is DiBiagio's claims of considering terminations in "his own thought processes" in late May, a matter he claims to have shared with others (unnamed) "verbally, right at the end of May," which led to "meetings and talking about it . . . that very first week of June." None of this is corroborated by any witness (with the exception of a June 2 meeting at which no decisions were made). The record shows some emails from Gill in the first weeks of June laying out some of the forecasting and order data, but Gill testified adamantly that she had no involvement in the layoffs and participated in no discussions about the layoffs. All we know for sure is that by the time Schultz returned to work on June 16, "there had been further discussions and that we were going to have to have a reduction in force."

And recall, that even DiBiagio, in his testimony, did not describe a decisionmaking role in the terminations: or provide an account of the meetings in which the decisions were made. Asked about his role, he answered in a manner that sounds assistive and passive rather than managerial: "The role I played in the process was validating loading capacity, meeting that, validating where we were with orders, what it looked like in terms of what we need for capacity, and then beyond that it was—being that this was. . . the first layoff I was involved with, that I wanted to make sure that whatever process we used was a fair process."

I feel that we do not have the entire record of events; that something is missing from the narrative of how and when the decision was made. Given the proven animus, I think its absence detracts mightily from the claim that the Respondent has proven that it would have ordered these terminations even in the absence of union activity.

As framed in the record, the decision is so internal to the thought processes of the unnamed decisionmaker, so much within the discretion of the decisionmaker, that it leaves the observer with little basis other than faith to conclude that the termination decisions would have been made even in the absence of union activity. And given the weight of the General Counsel's initial case—the proven animus as a motivating factor—the Respondent's vague account of the process of the decisionmaking is undermining to its case. Indeed, what we know clearly, from Schultz' admission, is that, for whatever reason, the Respondent felt "urgency" to make its termination decision before the union election of June 19. The Respondent has not offered an explanation for this urgency, although its haste compelled it to have to make plans for August terminations based on June forecasts—itself an unusual display of future planning for an employer that claims the need for any layoffs arose suddenly in June. The rush to get the terminations decided before the first union election on June 19, while not alleged to be an independent violation, certainly seems, at a minimum to weigh against the claim that the termination decision of June 18 would have been made in the same way even in the absence of union activity.

In sum, I find that the Respondent has not proven that it would have made the same termination decision in the absence of union activity, based on the decline in business that it faced in June 2014.

Outsourcing as a motive for terminations

The Respondent contends that outsourcing attendant to its efforts to solve the zinc wastewater discharge problem was the motivation for the June 18 decision to terminate one painter and two weld/fab operators on June 26, and the motivation for the June 18 decision to terminate three painters on August 14. The Respondent contends that it would have made these termination decisions even in the absence of union activity.

As I have found, the outsourcing was initially pursued beginning early in 2014, unrelated to union activity, and with no hint that it would lead to loss of work for the incumbent employees. As of April 16, when Terex raised with Liesch and the MPCA the possibility of addressing the zinc problem with an alternative to building a wastewater treatment system, an alternative that included outsourcing, terminations were not mentioned as a consequence of the outsourcing. There is no evidence at all that the original plan to increase outsourcing as a solution to the zinc problem was envisioned as a plan to "close the paint line down" or "get out of the painting business," as the representative of Terex's supplier of cabs Custom Products later came to understand the plan in the summer of 2014. Indeed, as referenced above, DiBiagio said the opposite in his April 16 discussion with employees.

DiBiagio told employees that with the outsourcing there would be insourcing of small parts previously outsourced to make way for contracts (such as Takeuchi) that had been completed and not renewed. This would create welding work, which, in turn, would create painting work. (Tr. 731, 837.) Employees testified and recalled clearly that in his discussions about outsourcing "probably before the Union," DiBiagio suggested to employees that work would be insourced to offset any outsourcing. (Tr. 725, 804, 730–731, 788–789); ("We're going to bring all our little stuff back in house. So there'll still be plenty of paint work for everybody"); ("It ain't a bad thing that the work is going to change. Instead of the bigger parts, we'll be doing smaller parts").

Moreover, DiBiagio made clear to employees that there would be no layoffs because of the outsourcing. ("somebody asked [DiBiagio] if there was going to be any layoffs, and he said no" (Tr. 731)); (DiBiagio "more or less promised there wouldn't be any . . . [l]ayoffs") (Tr. 788)); (DiBiagio "wanted the cabs and the chassis powder coated so it would last longer out in the field. But then, in the same meeting, he went on to say 'None of you guys will be, you know, impact[ed] by this, because we're going to bring all our little stuff back in house. So there'll still be plenty of paint work for everybody.'") (Tr. 789).)

The employees' testimony is supported—and elaborated

on—in the stipulated transcript of DiBiagio's April 16 meeting with employees, derived from an audio recording of the meeting. DiBiagio told the employees that there would be "outsourcing" but also "insourcing," so "[s]ome of that is gonna stay where it is, some of it's going reverse" and that would help employees because Terex would not be able to "ramp[ ] this plant up" and "still make all the chassis and motors and paint everything." DiBiagio noted that as it was "[i]t's very difficult on a lot of our qualified welders" and "[w]e just can't find the people" to do all the work in a growing plant.[50]

DiBiagio assured employees that the outsourcing "doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. . . . So you're not in danger of losing jobs or anything like that, okay?"[51] DiBiagio explained to employees that "it makes a lot of sense" to have work outsourced to Weisgram, "we'll focus on other parts and other things . . . So don't be worried about running out of work."[52] DiBiagio told the employees, that the changes are "not bad stuff. It's all good stuff." He told the employees,

> You might hear that we're quoting Weisgram to do the skid steer chassis. Well, that's because we are, and the reason being is not because you're doing a bad job. It's because, geez, you know it might make sense just to do it all out there because we're not going to be able to grow that as big as we'd like to. So, let's do what we can do, well, and then we'll hire out there so then getting support to help us when we need it. Overall, the plant will get bigger and we'll be hiring more people.

In this April 16 meeting, and in other meetings with employees, DiBiagio stressed that he was speaking honestly to the employees, "just talking to you one-on-one like I always try to do." These admissions—and in terms of evidence, they are admissions—demonstrate that the outsourcing was not a plan that required or was conceived as a plan that would result in job loss for employees.

However, I think the evidence supports the proposition that the outsourcing efforts changed in character and motivation in June 2014, once the Respondent committed itself to having terminations. A zealous but immediately unsuccessful effort to substitute outsourced painting for employee painting took on a momentum in the context of and because of the plan to terminate employees. The outsourcing was not the motivation for the terminations, rather, the outsourcing suddenly became a means to try to accomplish the terminations.

As the General Counsel points out, (GC Br. at 111–112) in the first weeks of June there was a remarkable and new zeal to the Respondent's efforts to push suppliers to ramp up their outsourcing work. It does stand out in the correspondence—as the General Counsel puts it: "there was some future event that was driving a massive need to rapidly outsource paint production." Id. at 111 (italics in original). This is starkly reflected in the Respondent's June correspondence with suppliers.[53]

Indeed, while, in April, as part of his discussion with employees about outsourcing, DiBiagio had discussed the Respondent's desire to "get[ ] some better supplies in here . . . and "[c]onsolidat[e] the number of suppliers, getting stronger partnerships with fewer suppliers," in its zeal to find outsourcers in June, the Respondent had to acquiesce to looking to new third parties to try and accommodate the urgent requests for painted

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[50] According to DiBiagio:

> Supply chain, same kind of things we've talked about, looking at what we're outsourcing, and looking at what insourcing. What are we sending out? What are we bringing in? Some of that is gonna stay where it is, some of it's going reverse. We're gonna bring in some stuff that we're not pulling today. We're gonna send out some stuff that we are pulling today, because it makes it a lot more sense, okay, to do that. Two things, and I know lot of you guys that are in here, and again I just tell it like it is. We have a very, very, very, very slim chance of ramping this plant up to 25 to 30 machines a day and think that we're going to be able to make all the chassis and motors and paint everything. Right now, we barely have the capacity to do that, to do what we need to do. It's very difficult on a lot of our qualified welders. We have a lot of good welders on staff. You guys do an awesome job, but imagine trying to get three to four times the number of folks that we have today. We just can't find the people, okay it's very difficult.

[51] DiBiagio told employees:

> It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. . . . So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doing that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay?

[52] DiBiagio told the employees:

> So it makes a lot of sense to say, okay Weisgram, you're making all the other chassis of ours, why don't you make these also? It's just a few more. And then what we'll do is we'll focus on things like [quick attaches] . . . [original ellipses] and we'll focus on other parts and other things that we're doing here. . . .
>
> We're going with quick attach and we brought in another quick attach in, right. That kind of thing, so we're looking at bringing more of the small parts in and stuff that we can turn real easy, real quick that we can do a really good job at. Then the stuff that we know we're gonna be constrained and will be real major obstacles to us down the road, let's farm that out so that we can grow this business and do it in a way that we can be very successful. So, don't be worried about running out of work.

[53] See e.g., May 12, 2014 email requesting quotes from RDM "asap so we can get going on this project." (GC Exh. 65); June 4, 2014 email to Innova stating "[w]e are under the gun to get these cabs coming to us painted, so the sooner the better." (GC Exh. 67.); June 5 email to Weisgram indicating "[t]here is a big push to get these [loaders] in pained asap." (GC Exh. 68.); June 9 (high importance) email to ProBlast stating "We need to get the cost for you to paint these chassis's and loaders. Any chance you can get that to us by this afternoon." (GC Exh. 69); June 11 email to Innova stating "I know this is a rush but can you please have your subcontractors perform the necessary tests to be sure the parts are compliant with the Terex Paint Spec." (GC Exh. 71.); June 12 "High importance" email from RDM to Respondent quoting painting for third party D & K powder coating. (GC Exh. 72.); June 16 email to Innova questioning costs on outsourcing (GC Exh. 74.); June 16 internal email requesting prints for loader arms to be "sent out right away." (GC Exh. 77.)

product.[54]

As to the insourcing promised by DiBiagio in the April 16 meeting—the salient point is not just that it did not materialize, but that there appeared to be little effort directed toward it. DiBiagio testified that "not a lot" of insourcing occurred, although he maintained that considerable effort and energy had been put into the endeavor. However it was demonstrated at trial that the Respondent had no emails, correspondence, or memos concerning insourcing of work for the paint department. The Respondent did not demonstrate that it made any significant effort to insource weld work despite DiBiagio's presentation to employees on April 16.

Thus, while I have found the evidence lacking to demonstrate that the initial decision to include outsourcing as part of a multi-faceted plan to avoid building a wastewater treatment system was discriminatorily motivated, the fervor around the outsourcing in June does seem suspicious. This is the very time that the Respondent is deciding on layoffs—and, of course, developing justifications for them. Of course, it is possible that the vigor with which it approached outsourcing efforts at this time were motivated by a desire to meet the state's schedule to reduce zinc emissions, but this is not proven or even suggested by the Respondent. And indeed, as of the hearing date in November 2014, the Respondent had yet to bring its pollution levels into compliance.

In any event, what is clear from the record is that the Respondent's efforts to outsource was an endeavor that met with delays, and problems that rendered it impossible for the Respondent to accurately plan future employment around its outsourcing. Suppliers were not ready to accommodate the Respondent's demands, or did so only with unacceptable lapses in quality. Weisgram indicated in June that, contrary to the Respondent's request, "We are not ready to paint loaders yet" and that it had discussed this with Hoeschen when she visited. Despite the Respondent's efforts, Hoeschen informed her colleagues on June 12, in an email marked "High" importance, that Weisgram had declined to paint the RDM chassis and loaders, was unwilling to paint cabs because of quality issues, and would liquid paint loaders using an outsourced company. The Respondent's request for powdercoating of these items was delayed. Further, Weisgram delayed their work on the SSL loaders without giving a date. In the same vein, the testimony of Adam Hughes, a representative of Custom Products, which supplied cab enclosures to Terex for a number of years, described a litany of problems that Custom Products was having in the summer, as early as June 24, and into the fall of 2014, meeting Terex's new demands for prepainted cabs at quality levels sufficient for Terex to use. (See also, email correspondence between Custom Products and Terex (GC Exh. 16) detailing numerous deficiencies in timing and quality of cabs.) Essentially, Custom Products was "having trouble meeting our commitments" to Terex and had to continue sending unpainted cabs to Terex that would need to be painted by the employees of Terex's paint department.

Amidst this uncertainty it is even less plausible—and more suspect—that the Respondent could—or would choose to—plan on June 17 that it would need three less painters on August 14, as a result of increased powdercoat painting.

And why would it plan terminations so far in advance? Its outsourcing plans had been envisioned for months, and employees told there would not be layoffs associated with it. All of this points to the (admitted) desire to get these terminations decided upon prior to the painters election. And equally, to the zinc problem being an after-the fact justification for terminations that the Respondent committed itself to for other reasons. Indeed, the explanation for the terminations offered by management to the terminated employees—both in June and August—did not include the explanation that outsourcing or efforts to combat zinc pollution were a cause of their terminations. None of the Respondent's officials who met with the terminated employees offered any such explanation. The difficulties in ramping up the outsourcing explain, I believe, why the employees who were terminated, both on June 26 and on August 14, were not told that the outsourcing and/or zinc was a reason for their layoffs, even when employees objected to or challenged the proffered explanation given that the layoffs were the result of declining work orders. I think this is because the Respondent's experience with the outsourcing in the spring through the summer made this an untenable rationale for employees who were aware of the problems with the painted work supplied by the outside suppliers.[55]

The concern that the outsourcing had turned into a means of eliminating the painters unit did not go unnoticed around the facility. Custom Products is a leading supplier of cabs to Terex and heavily involved in Terex's efforts to receive more prepainted cabs. When Custom Products' longtime Terex account manager Adam Hughes and a colleague visited Terex on July 11 to deliver cabs and discuss work requirements with Terex officials, he learned for the first time that there was now a union at the facility (the painters union). He met at various times with four people at Terex that morning: Rob Levitz, Todd Monroe, Travis Antilla, Clem Moger, and had passing conversations with a couple of younger engineers. While speaking with one (or more) of these people at Terex, someone told him, as he

[54] See, GC Exh. 67 (June 4 emails with Innova indicating that "we don't have painting capabilities in house" and stating that they are meeting with companies who might be able to do the painting—Terex's response that day is "We are under the gun to get these cabs coming to us painted, so the sooner the better"); GC Exh. 70 (Weisgram indicating that it would be outsourcing loaders and that they would be liquid painted); GC Exh. 72 (RDM quoting materials with D & K Powdercoating); GC Exh. 74 (Innova quoting painting with 59 Finishing); GC Exh. 75 (RDM quoting painting with Accu-Rite, D & K Powdercoating, and Metal Finishers, Inc.); GC Exh. 69 (Terex June 5 email seeking quote for painting of chassis and loaders from a new company ProBlast).

[55] It is true that the Respondent's internal "narrative" of the reasons for the layoffs, and its June 26 "effects bargaining" letter to the Union attributed the layoffs in part to outsourcing due to the zinc problem. But these documents were, I believe, prepared in anticipation of litigation, the narrative with input of counsel, and the letter to the union written by counsel. They reflect matters as the Respondent wanted them to appear. I do not discredit the letters on that basis, but neither do I rely on them as independent evidence of the truth of the matters asserted therein. They are hearsay—out-of-court statements not reliable for the truth of the matters asserted.

wrote in the post-trip report he prepared about the visit to Terex:

> Terex is trying to get out of the painting business for two main reasons. They do not have waste treatment system capable of handling the volume of product they are producing. The union has also just recently succeeded in getting their foot in the door at Terex, but only in the paint department. It is their goal to eliminate painting, therefore eliminating the union the Grand Rapids plant.[56]

Hughes could not (or would not) attribute the statements to a particular person, repeatedly testifying that "I can't say exactly which person I heard that from," and "I can't tell you who that came from. I can't recall." However, even when pressed on cross-examination, Hughes remained adamant that "I recall hearing that that day," and also stating that "I try to get a feel for the business climate when I go to visit a customer . . . So . . . I don't think I would have put it in [the report] if I wouldn't have heard it somewhere, but I don't recall exactly who said that."

I believe, and find, that Hughes was told this by one (or more) of the Terex employees with which he met. And I suspect (but do not find) that he knew but was unwilling to say who told him this. The inclusion of the comments in his written report provided to his superiors—a report Hughes evidently took seriously—precluded any chance that Hughes would deny that he heard (and believed) the statements. However, I suspect that his continuing business relationship with Terex provided a disincentive to remember any more than was in the report—such as who told him this information.

As the Respondent points out, this mitigates the probative value of Hugh's testimony. None of the Terex employees with whom Hughes met while at Terex that day testified, and only one Antilla, has been established to be a supervisor or agent of the Respondent. The General Counsel alleged that Monroe and Levitz were supervisors and/or agents but made no effort to prove it, and the Respondent denied it. Moger's only other appearance in the transcript is that he escorted a terminated employee off the premises. And then there are the two unidentified younger engineers (although I think it unlikely that passing comments with them were the source of this information)

Hughes' comments are hearsay—something that he was told on his visit. But the statements are not nothing. We know that they were offered in a serious enough manner that Hughes took them to be true and reported them to his managers in a business report he prepared for them. The comments are corroborative of the General Counsel's theory of antiunion animus, which, I have found, is proven based on other evidence.[57] The comments made to and reported by Hughes add to the case against the Respondent. Further, the comments detract from the Respondent's contention that it would have undertaken the terminations even in the absence of union activity.

I find that the Respondent has failed to meet its burden of proving that it would have terminated the employees because of its outsourcing efforts even in the absence of union activity.

For all of the above-stated reasons, I find that the termination of the employees on June 26, and August 14, violated Section 8(a)(3) and (1) of the Act.[58]

The reclassification of Rajala and Willson

The General Counsel argues (GC Br. at 121) that Rajala and Willson's reclassification to the assembly department was unlawfully motivated. More specifically, the General Counsel claims that these two employees were targeted for reclassification because of their union activity, and their conversation with Storlie. The General Counsel also argues that the timing of the reclassifications is suspicious, because it occurred only days after the assembly election, and, argues (GC Br. at 122) the General Counsel, "had the effect of preventing two known union supporters from being eligible to vote in the assembly election."

I do not believe that any of this explains their reclassification. Indeed, it is unclear that the Respondent would have any reason to target these two employees for reclassification. In terms of Wright Line, there is zero evidence that the Respondent was aware of any union activity by either Rajala or Wilson. The fact that Storlie made anti-union comments to them (and I have not credited the ones made to Willson and Rajala together as being unlawful) does not demonstrate knowledge of their union activity or reasonably explain a decision to target them. It is useful to recall that neither employee was eligible to vote in either the paint or assembly election. The General Counsel seems to suggest that their reclassification was delayed to affect voter eligibility, but the evidence does not support that, and, in any event, that would not be an unlawful motive for making the change, but rather, for delaying it, and the integrity of the voter eligibility roles is not part of my charge (or the General Counsel's allegations).

It seems to me quite clear from the record that the decision to reclassify Rajala and Willson was not the result of targeting them but a product of the Respondent's overall plan to move people out of weld/fab. The General Counsel has alleged, and I agree, that the terminations of employees as part of this plan were unlawfully motivated. However, the General Counsel has not alleged that the reclassifications and/or transfer of employees as part of this plan was unlawful. I do see a difference. Temporary reclassification was a practice engaged in by the Respondent in early 2014 and late 2013—Rajala and Willson had been working out of classification since February. A permanent reclassification pays them in accordance with the work they are doing and, in an important distinction with employees

[56] While these quotes come from Hughes' report, at trial Hughes endorsed that he was told this during his visit.

[57] *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("Courts have long recognized that **hearsay** evidence is admissible before administrative agencies, if rationally probative in force and if **corroborated** by something more than the slightest amount of other evidence. The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance") (citations omitted); *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994).

[58] The General Counsel devotes extensive argument to the contention that the choice of the individual employees selected for termination was discriminatory. Indeed, the General Counsel contends that the selection process was so skewed that it adds to the finding that the mass layoff was discriminatorily motivated. Given my findings, I do not reach these arguments.

terminated, reclassification (temporary or permanent) keeps the hard-to-find welders and fabricators employed with the prospect of returning to weld/fab when the employer needs them. This is consistent with the Respondent's recognized interest—predating union activity—in maintaining welders and fabricators on the payroll.

I do think an argument could be made that the permanent reclassifications and transfers were a constituent part of the overall termination plan, and, thus, unlawful. But the General Counsel does not make this argument with regard to any employees reclassified or transferred. Indeed, Rajala and Willson are the only reclassified employees as to which it contends unlawful actions were directed. And it makes the argument, not on a theory of general or mass retaliation for union activity but on a theory of specific retaliation against these two employees for their union activity. The evidence does not support it. The General Counsel has not made out a prima facie case as to the Employer's alleged discrimination against Rajala or Willson.

The severance agreements as a defense to (most of) the 8(a)(3) allegations

Each of the employees terminated on June 26, and on August 14, was offered a severance agreement that included a broad release and waiver that was a condition for receipt of the severance pay. The payments equaled 4 weeks of pay, but for some of the longer serving employees, 8 weeks of pay. The severance agreements included a broad release of claims "arising from facts occurring on or before the date I sign this Agreement." They also provided that the employee waive and release any claims under a variety of federal and state anti-discrimination statutes, including "the National Labor Relations Act." Employees over age 40 were provided a 45-day period to consider the agreement and acknowledged that "[t]he Company has told me to discuss this Agreement and Exhibit A with a lawyer." Exhibit A to the Agreement was a chart reflecting the affected job categories and the ages of employees selected for layoff and for retention. For employees over age 40, the agreement also provided a seven-day period to revoke the agreement. (Employees under 40 received a ten-day period to consider the agreement and no revocation period).

The severance agreements also imposed certain obligations on employees in consideration for the severance payments:

> 5.4 In consideration for the Severance Pay and Benefits, I will cooperate with the Company in ensuring a smooth transition following my departure. This will include, without limitation, my cooperating with and making myself reasonably available to the Company, as the Company may reasonably request, to assist it in any matter, including giving truthful testimony in any investigation (internal or external), proceeding, litigation, or potential litigation or proceeding, about which I may have knowledge, information, or expertise. My obligation to fully cooperate with the Company extends beyond the end of the severance period.
>
> 6. **Confidential Information.** If I have learned any secret or confidential information while employed with the Company, I promise I will never disclose it to anyone or use it for my own benefit. Secret or confidential information is valuable information that the Company uses but the public does not know. It includes Company product, price, sales, business, employee or financial information, and information about customer names, needs and requirements. I understand that this Agreement cannot possibly list all of the types of secret and confidential information. Therefore, if I have any doubt about whether any information is secret or confidential, I will obtain the Company's permission prior to disclosing or using this information.
>
> 7. **Negative Statements.** After my last day of work I agree that I will not make negative or critical statements about the Company or any of its employees.

Eleven of the 13 terminated employees signed the severance agreement and received the payments. Two—Persson and Knight—did not. The Respondent contends that the General Counsel's 8(a)(3) unlawful termination allegations are barred as to all discriminatees, save for Persson and Knight, by their agreement to the terms of the severance agreements.

The Board has been willing, in certain circumstances, to find that employee-signed "waiver and release agreements signed by the alleged discriminatees bar their claims for relief under the Act." *Hughes Christenson Co.,* 317 NLRB 633 (1995), enft. denied on other grounds, 101 F.3d 28 (5th Cir. 1996). The Board's view is that with appropriate safeguards and in the proper context, "it would effectuate the purposes and policies of the Act to give effect to broadly worded waiver and release agreements signed by employees in exchange for enhanced severance benefits." *BP Amoco Chemical-Chocolate Bayou,* 351 NLRB 614, 615 (2007). In assessing private settlement agreements, the Board recognizes that "[s]uch agreements serve an 'important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation.'" *Hughes Christensen Co*., supra (quoting *Independent Stave Co.,* 287 NLRB 740, 742 (1987)).

"Notwithstanding this strong commitment to settlements," the Board also holds that it "is not required, however, to give effect to all settlements reached by the parties to a dispute with or without the General Counsel's approval." *Independent Stave*, 287 at 741:

> For it is well settled that the Board's power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights and the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Finally, the Board has also stated that, in exercising its discretion, it will refuse to be bound by any settlement that is at odds with the Act or the Board's policies.

Id. (footnotes and internal quotations omitted).

In assessing the effect of employee waiver and release agreements, the Board has applied the same standard it uses when assessing whether to give effect to private parties' non-Board settlement of unfair labor practice cases. See, BP Amoco Chemical-Chocolate Bayou, supra. This involves consideration of the factors set forth in *Independent Stave Co.,* 287 NLRB at 743 (1987). Under Independent Stave, in determining whether to approve a settlement,

> the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

In the instant matter, applying factor 1 of the 4 Independent Stave factors, the Charging Party has not agreed to be bound and the General Counsel opposes the settlements.[59]

Turning to factor 3, there is no credible evidence or argument that there was any fraud, coercion, or duress by any of the parties in reaching the settlement.[60]

As to factor 4, while this Respondent has not breached previous settlement agreements and does not have a history, beyond these cases, of having engaged in violations, in *Goya Foods*, 358 NLRB 345, 347 (2012), the Board interpreted this factor to include the situation where the employees "agreed to the settlements in an atmosphere of serious, unremedied unfair labor practices."[61] The fact is, the settlements in this case were signed in the wake of the terminations, but also in the wake of the Respondent's unremedied threats of plant closing and implied threats of retaliation against the painters for voting for the union. As I have made clear above, I believe that the terminations were related to the union campaign, as were the expressions of 8(a)(1) animus by the Respondent. It is an atmosphere that weighs against the acceptance of these settlement agreements.

This leaves factor 2, the reasonableness of the settlement. As to this factor, I note that the Board has also previously relied on the existence of unremedied unfair labor practices to reject a private settlement as bar to the General Counsel's case. *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998). Moreover, the settlements in this case are not only piecemeal—leaving many unfair labor practices unremedied—but they also do not provide for notice to other employees of the resolution of the unfair labor practices and do not provide for reinstatement. As the Board noted in Flint Iceland, a private settlement that combines lack of reinstatement with lack of notice to other employees is particularly at odds with the Act. While a lack of notice with reinstatement "would tend to reassure other employees that statutory rights will be protected," a settlement with neither leaves "nothing in the instant settlement that would communicate to unit employees the vital message that they are free to exercise their statutory rights without interference from their employer." 325 NLRB at 319. I think this is a very significant factor weighing against acceptance of the settlements in this case. The settled and the unsettled unfair labor practices at issue here all emanate out of and in response to the union's campaign. The unsettled unfair labor practices were unremedied and fresh—occurring just days before most of the settled termination violations. The "case" is hardly settled, and employee rights hardly protected, by permitting certain employees to waive reinstatement and take cash settlements, while leaving the rest of the issues to be litigated. The alleged unfair labor practices were directed toward the facility at large and not simply to the individuals terminated. Independent Stave was developed to consider the parties private non-Board settlement of an entire unfair labor practice dispute. Here, we have an effort to apply that standard to a private effort to avoid litigation over certain parts of these cases. This context renders these settlements unreasonable in my view.[62]

Based on these factors, I would find that the settlements here do not meet the standards set forth in Independent Stave. But there is a further more serious problem with these settlement agreements that renders them unenforceable, quite apart from an Independent Stave analysis.

The settlements contain terms that are at odds with the Act's policies and, therefore, the settlements are not valid under Board precedent. Specifically, each of these settlement agreements requires that employees agree to (1) "without limitation," "assist" [the Respondent] in any matter . . . about which [the employee] may have knowledge, information, or expertise; (2) not disclose or use "for [the employee's] own benefit" any "secret or confidential information" which is defined to include "employee" information and to the extent the employee has "any doubt about whether any information is secret or confidential," the employee is required to "obtain the Company's permission prior to disclosing or using this information; and (3) "not make negative or critical statements about the Company or any of its employees."

These requirements invalidate the settlement agreements be-

[59] One may note that in this situation the General Counsel and Union's opposition is essentially a given. We would be highly unlikely to be where we are in this litigation if the Union had agreed to be bound, and assuredly would not be here if the General Counsel supported the settlements. Still, it remains a relevant factor in the analysis.

[60] The General Counsel argues (GC Br. at 139) that employee Andrews' testimony that he had to sign the settlement because he had children and a house payment "illustrates the coercive circumstances" involved here and establishes that the waivers are "clearly contrary to the intentions of the Act." It is true that virtually all terminated employees face significant personal financial demands that leave many with little practical alternative to accepting a severance offer, without regard to the details of the release. However, such financial pressure obviously does not amount to "coercion" as the Board applies the term. If it did, then releases providing for severance pay would be coercive in nearly every instance.

[61] That case is not precedential, as it was decided by a panel in which two of the three members were not appropriately appointed. See, *NLRB v. Noel Canning*, __ U.S. __ 134 S.Ct. 2550 (2014). However, I think the reasoning is persuasive, and I adopt it.

[62] Notably, the chief cases that the Respondent relies upon contain very different facts in this regard. Thus, in *BP Amoco Chemical-Chocolate Bayou,* the terminations and settlements were completed more than 6 months before the additional unremedied unfair labor practices that were not addressed by the settlements, a factor relied upon by the Board in approving the settlements. 351 NLRB at 616 fn. 10. In *Hughes Christenson*, supra, the whole unfair labor practice case involved the failure to transfer the three employees who signed the settlement and waiver agreement. By accepting the settlements the Board dismissed the entire pending unfair labor practice dispute.

cause each of these provisions would reasonably chill and reasonably be understood to restrict protected and concerted activity.

Defining confidential information that may not be disclosed as "employee information" does not seem meaningfully distinguishable from prohibiting the disclosure of "confidential information about . . . 'fellow employees.'" That has been found to be an unlawful restriction.[63] It is also not meaningfully distinguishable from prohibiting the disclosure of confidential information defined as "personnel information" which has also been found unlawful.[64]

The problem is made worse by the settlement agreement's requirement that an employee with "any doubt" as to whether the employer considers particular information, including "employee" information, to be confidential, "obtain the Company's permission prior to disclosing or using this information." This requires that an employee desiring to disclose even potentially confidential "employee" information disclose his or her intentions to management and obtain permission of management. The compelled disclosure to management of intended Section 7 activity and the necessity to obtain management permission for it is antithetical and repugnant to first principles of the Act.

Finally, the requirement that employees "not make negative or critical statements about the Respondent or any of its employees" is clearly unlawful.[65] Indeed, it might serve to chill employee concerted activity not only with other employees but cooperation with the NLRB as well. At the same time, the requirement that employees be available to "assist" "without limitation" the Respondent "with any matter"—including, specifically mentioned, its preparation for litigation, goes quite a bit further, without any safeguards, than the law allows. See *Johnnie's Poultry, Inc.,* 146 NLRB 770 (1964).

Settlement agreements may not require prospective waiver of Section 7 rights. *Ishikawa Gasket America, Inc.,* 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). See also, reasoning of nonprecedential decision in *Goya Foods*, 358 NLRB 345 (2012). These do.

In truth these settlement agreements are unlawful and violations of the Act. However, there is no allegation to that effect and I do not find a violation on those grounds. But the settlements' legal infirmity is grounds not defer to them or rely on them as a bar to the General Counsel's case.

V. THE GISSEL BARGAINING ORDER

The General Counsel argues that the severity of the unfair labor practices at issue in these cases warrant the issuance of a remedial bargaining order requiring the Respondent to recognize and collectively bargain with the assembly unit.

The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 612 (1969). The Supreme Court has sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . . ." *Gissel*, 395 U.S. at 610. As the Court explained in *Gissel*,

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign. There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition.

395 U.S. at 612–613 (footnote omitted).

Pursuant to Gissel, the Board will issue a remedial bargaining order, absent an election, in two categories of case. Category I cases are "exceptional" cases, marked by "outrageous and "pervasive" unfair labor practices the coercive effects of which cannot be erased by traditional remedies, thus rendering a fair and reliable election impossible. *Gissel***,** 395 U.S. at 613–614. In category I cases, the bargaining order is appropriate "without need of inquiry into [the union's] majority status on the basis of cards or otherwise." Id. Category II cases are less extraordinary cases marked by a lesser showing of employer misconduct, but which still have the tendency to undermine majority strength and impede the election process. *Gissel*, 395 U.S. at 614. In category II cases, a bargaining order is appropriate where there is a showing that at one point the union had a majority but in light of the unfair labor practices the possibility of erasing the effects of the unfair labor practices and ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. *Gissel*, 395 U.S. at 614–615. Finally, the Court explained in Gissel that there is a "third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615.

Although maintaining that the Respondent's unfair labor practices "obliterate" the possibility of a fair rerun election, the

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[63] *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999) (rule prohibiting employees from revealing **confidential** information regarding customers, fellow employees, or hotel business, unlawful).

[64] *Flex Frac Logistics v. NLRB*, 746 F.3d 205, 210 (5th Cir. 2014) (enforcing, *Flex Frac Logistics*, 358 NLRB 127 (2012) (as a *Noel Canning*-era case, the Board case is not precedential, however, I am persuaded by its reasoning).

[65] *Claremont Resort & Spa*, 344 NLRB 832 (2005) ("rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful"); See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule against "derogatory attacks on hospital representatives" unlawful), enf'd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) ("By permitting the punishment of employees for speaking badly about hospital personnel, the employer 'failed to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities'") (quoting *American Cast Iron Pipe v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979)).

General Counsel argues that a bargaining order is appropriate as a category II case. Thus, the General Counsel must show first, that "at one point the union had a majority" in an appropriate unit and second, that the possibility of erasing the effects of the unfair labor practices and ensuring a fair election is slight and that the majority employee sentiment for the union once expressed through authorization cards is, on balance, better protected by a bargaining order.

The Respondent challenges both claims, arguing that the Union has failed to demonstrate that it ever had majority support, and that the unfair labor practices at issue here do not warrant a bargaining order remedy.[66]

A. Majority support

In support of its claim that the Union had one time had majority support in the assembly unit, the General Counsel relies on the showing at trial that 26 employees in this 41-person unit signed union authorization cards in the lead up to the election.

The use of authorization cards to establish a union's majority support has a long history in our labor relations. *Gissel*, 395 U.S. at 597 ("Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means . . . for instance . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes").

In this case the Union solicited employee signatures with authorization cards that are headed: "AUTHORIZATION FOR REPRESENTATION" and the text of the cards state:

> I, the undersigned employee of [the employer] hereby select the above-named union as my collective bargaining representative. I understand that this is not an application for membership and that this card may be used to gain voluntary recognition from the employer or to gain an election through the National Labor Relations Board or both.

This card meets the standards for establishing an employee's presumptive support for representation under the standards articulated in *Cumberland Shoe,* 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965), and approved by the Supreme Court in *Gissel*, 395 U.S. at 606–608.

In Cumberland Shoe, the Board established a rule, followed to this day, that cards that explicitly authorize the union to act as the employees' bargaining representative will be presumptively valid as evidence of support.

The cards in this case state clearly that the undersigned employee "select[s]" the Union "as my collective bargaining representative." The appropriateness of the card as an indication of support for representation is not, as the Respondent contends, undermined by the reference in the body of the card that it "may be used to gain voluntary recognition from the employer or to gain an election through the National Labor Relations Board or both." To the contrary, as the General Counsel points out, the Board has approved as "free of ambiguity" the use of a card with nearly identical language as the ones here as a basis for proving majority support. *Mayfield Produce Co.,* 290 NLRB 1083, 1088 (1988) (approving card that stated: "I, the undersigned employee of . . . authorize . . . [the Union] to represent me in collective bargaining" followed by notification that "this is not an application for membership" and then the statement that "This card is for use in support of the demand of Teamsters Local Union 525 for recognition or for an N.L.R.B. election"). See also, *Avecor, Inc*., 296 NLRB 727, 747 (1989) (cards unambiguously authorized union to be collective-bargaining representative where cards stated that they authorized union "to request recognition from my employer as my bargaining agent and/or to petition the [NLRB] for an election for certification of said Union as my bargaining representative"), enft. denied on other grounds, 931 F.2d 924 (D.C. Cir. 1991).

The Respondent argues that the cards here have "subtle, but significant distinctions" from the cards in Mayfield, but I cannot accept its arguments in this regard. The distinction the Respondent points to is that while the cards here say they may be "used to gain voluntary recognition," the cards in Mayfield stated that they were for use in support of a "demand" for recognition. The Respondent argues that "voluntary recognition" is a more limited use than cards used in support of a "demand" for recognition and that, unlike a "demand" for recognition, use of cards in support of "voluntary recognition" does not encompass the use to which the cards are being put here, in support of an imposed bargaining order.

This is wrong in two ways. First, the word "demand" is common parlance for the request for recognition that a union makes upon employers when they seek voluntary recognition based on cards, other evidence, or a presumption of majority support. Whether phrased as a demand, a request, or something less forceful, the recognition sought, in every case, is "voluntary recognition" by the employer.

Second, whether the card says "demand" for recognition or "to gain voluntary recognition," neither states or anticipates that the card will be used in support of a Gissel bargaining order. To suggest that they must misconceives the role of authorization cards in support of a Gissel bargaining order. The General Counsel's request for a Gissel bargaining order is based on the employer's unfair labor practices—it is not based on authorization from employees for a Gissel bargaining order. In a Gissel bargaining order case, the cards are relied upon not to demonstrate employee support for a Gissel bargaining order, but rather, to demonstrate that at one time there was majority employee support for union representation. That support for representation is demonstrated by cards from a majority of the relevant employees "select[ing]" the union as "my collective-bargaining representative" or, as in Mayfield, "authoriz[ing] . . . [the Union] to represent me in collective bargaining." The cards in this case presumptively demonstrate support for the union to be the employees' collective bargaining representative, as they did in Mayfield. That is all they must show. I find that these cards are presumptively valid. In reaching this finding I

[66] The Respondent also contends in its brief (R. Br. at 128) and in its answer to the complaint that the assembly unit is not an appropriate unit. However, while the Respondent has preserved that position, it recognizes that the matter is foreclosed at this juncture by the Board's previous decision finding the unit appropriate in Case 18–RC–128308. *Terex*, 360 NLRB 1252 (2014).

reject the Respondent's contention that card solicitors are required to clarify or otherwise explain to card signers that the cards may be used for voluntary recognition.[67]

Turning to the cards themselves and the evidence surrounding their solicitation, seven of the 26 card-signers adequately authenticated their own cards from the witness stand. (Lake, Witte, Peterson, Baker, Broking, Lexvold, Wiese.) The Respondent raises no issue as to their cards (other than the argument, rejected above, that the solicitors were required to tell card signers that the cards could be used for recognition and not necessarily or only for an election).

The remaining 19 cards were authenticated by the card's solicitor. (Helvie, Lipsey, Olson, Clark, Hamilton, Garner, T. Erickson, Brohman, Jensen, Solem, Pasek, Murphy, Nelson, Holm, Carey, Stuber, Payne, G. Erickson, Grife.)

In most cases the solicitor described watching the card being signed by the solicited employee, at which point the card was returned to the solicitor. In two instances, the employee who signed the authorization card did not testify and the solicitor testified, but had not witnessed the card being signed. Those instances involved employee Steven Peterson and his solicitation of cards from employees John Brohman and Brandon Jensen. Peterson credibly testified that Brohman approached him and asked for a card and Peterson handed it to him. Later that day Brohman told Peterson that he had filled out and signed the card and placed it in his lunch box. Within an hour, Peterson retrieved the signed card from the lunchbox and Peterson identified the card at trial. Similarly, Peterson credibly testified that he provided Jensen with a card and told him to fill it out and bring it back when he could. Later that day Jensen told Petersen that he had filled out and signed the card and placed it in Petersen's locker. Petersen then found the signed card in his locker, and identified the card at trial.

The Respondent objects to the authentication of these two cards on the grounds that there was no testimony by a witness who saw the card being signed. However, Board precedent has long accepted the authentication of cards in these circumstances. *McEwen Mfg. Co*., 172 NLRB 990, 992 & fn. 15 (1968), enf'd. 419 F.2d 1207 (D.C. Cir. 1969); *Evergreen America Corp.,* 348 NLRB 178, 179 (2006) (The Board has long held that it "'will . . . accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing'" (quoting, *McEwen Mfg*., supra), enfd. 531 F.3d 321 (4th Cir. 2008).

The Respondent objects to the fact that three of the authorization cards (Clark, Hamilton, and Stuber), although otherwise filled out and signed, have the space for the name of the employer—where most employees wrote "Terex"—left blank. This does not provide a basis for doubting the authenticity or effectiveness of the card. The signatories were employees of the Respondent. The circumstances of the card signing were credibly testified to. *Knickerbocker Plastic Co*., 104 NLRB 514 fn. 3 (1953) (rejecting challenge to card: "Nor does the fact that the Respondent's name was omitted from a card or was written by a person other than the signer invalidate the designation where, as here, the signers at all times material have been employees of the Respondent").

The Respondent argues that employee Kossow, who solicited ten cards, testified that he told one employee signer, Grife, that "I explained to him that the card was for the Boilermakers permission to represent him and that it really didn't mean a thing and if [it][68] was to come to a vote with the Union, he could vote either way, it was his decision yes or no." On cross-examination, Kossow testified that his comment "it didn't mean a thing" was related to "[a]s far as voting yes and no" in an election. In other words "[i]f it came to an election, he could vote yes or no" despite having signed the card "for the Boilermakers permission to represent him." I believe that is the reasonable understanding of what was conveyed by Kossow to Grife, and I do not believe his comments expressly (or impliedly) told Grife "that [his] act of signing represents something" other than the wording on the authorization card. *Gissel,* 395 U.S. at 607–608.

More problematic, in my estimation, is the issue the Respondent raises based on Kossow's testimony that he told another employee signer, Stuber, that "the card was just for information for the Boilermakers, stating that he was interested in it." At that point Stuber interrupted Kossow, and, indicating that he was in a hurry to pick up his child, told Kossow, "Just give me the card and I'll sign it so I can get going." Had he been able to complete his explanation, Kossow would likely have explained the card along the non-objectionable lines that his testimony indicates he followed with regard to the other cards he solicited. But based on what he had a chance to tell Grife, it does seem to contradict the card. Kossow's statement to Stuber is that the "card was just for information for the Boilermakers, stating that he was interested in" the Union. Of course, the card states a more significant purpose than merely information for the Boilermakers to assay interest. The Supreme Court has made clear that for the most part, "employees can be counted on take responsibility for their acts" and thus, "bound by the clear language of what they sign." Gissel, 395 U.S. at 606. The exception to this is where the card's "language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and for-

[67] In reaching this finding I reject the Respondent's contention that card solicitors must clarify or otherwise rehabilitate the cards. The presumption is the other way. As the Supreme Court in *Gissel* explained,

> employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election.

Gissel, 395 U.S. at 608.

[68] The transcript (Tr. 950) has the word "he"—I have replaced it with "it." My personal notes reflect that I heard "it." It makes sense in context. "He" does not. Further, on cross-examination Kossow testified that he told Grife, that "If *it* came to an election, he could vote yes or no" (emphasis added). I hereby amend the transcript at page 950, line 3, and change the word "he" to "it."

get the language above his signature." 395 U.S. at 606–607. Kossow's statement to Grife, abetted by Grife's haste, was incorrect. I do not believe that Kossow "deliberately" canceled the language on the card, or that his words were "calculated" to do so, but the reasonable tendency of his statements would be that the card was "just for information." In any event, the disposition of this one card has no effect on the outcome of the majority status inquiry. I will assume that Grife's card is invalid and not count it toward the union's majority status as collective-bargaining representative.[69]

Finally, I note that there is no evidence that any of the assembly employees who signed authorization cards attempted to retract their card or have it returned by the Union or otherwise invalidated.

As of May 4, 2014, the Union obtained 21 valid, executed, and now authenticated cards, which demonstrates majority support within the assembly employees unit as of that date. The Union subsequently obtained 4 additional executed and authenticated cards, excluding Grife's. (See, GC Exh. 45(a)–(z).)

B. Appropriateness of a bargaining order

Having found that the General Counsel has demonstrated that the Union once enjoyed majority support in the assembly employees unit, I turn to the severity and likely effects of the unfair labor practices. Specifically, the question is whether the unfair labor practices are such that they leave only a slight chance that they can be remedied with traditional remedies in a manner that will ensure a fair re-run election, or rather, on balance, would a bargaining order based on the Union's demonstrated card majority provide a better expression of employee sentiment. *Gissel*, 395 U.S. at 614.

In making this determination it is appropriate to examine the seriousness of the violations, the number of employees directly affected by the violations, the extent of dissemination among the employees, and the position of the individuals committing the unfair labor practices. *Milum Textile Services Co*., 357 NLRB 2047, 2055 (2011).

Here, the most serious of the pre-election violations were the threats of job loss and plant closing made by DiBiagio and Ellis in the employee meetings on June 19 and 23. These violations were highly coercive and the type of unfair labor practices recognized by the Board to be particularly likely to undermine the prospects for a future fair election: "Threats of job loss and plant closure are 'hallmark' violations, long considered by the Board to warrant a remedial bargaining order because their coercive effect tends to 'destroy election conditions, and to persist for longer periods of time than other unfair labor practices.'" *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 638 (2011), enfd. 498 Fed. Appx. 45 (D.C. Cir. 2012), quoting *Evergreen America Corp.,* 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008). As the Board stated in *Wallace International de Puerto Rico, Inc*., 328 NLRB 29 (1999):

> We have long held that threats of plant closure and other types of job loss are more likely than other types of unfair labor practices to affect the election conditions negatively for an extended period of time. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enf'd. 47 F.3d 1141 (3d Cir. 1995). Such threats serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood. *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Wallace International, 328 NLRB at 30.[70]

Apart from the substance of these unfair labor practices, there are additional reasons to believe that a cease-and-desist order alone will not remedy these unfair labor practices in a manner that will ensure a fair election. The remarks were made in a structured formal meeting at which attendance was required simultaneously by all assembly employees. Thus, dissemination is not an issue as the as the unfair labor practices were made directly to all unit employees. Moreover, the fact that the threats were made in the days before the election, and not weeks before "maxim[ize] their coercive impact." *Federated Logistics*, 340 NLRB 255, 256 (2003), review denied 400 F.3d 920 (D.C. Cir. 2005).

The commission of the unfair labor practices by DiBiagio—the facility's general manager and highest ranking official at the facility—and Ellis—DiBiagio's boss, who flew into the facility for the purpose of making his speech—significantly contributed to and heightened the coercive impact of the violations. It was unlawful, coercive, and a hallmark violation for Dahlgren or Storlie to raise the specter of plant closing if the employees voted for the Union. The impact is of another magnitude when it was DiBiagio and Ellis who are the source of these threats: The Board has long held that "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of *Section 7* rights and the employees witnessing these events are unlikely to forget them." *Milum Textile Services,* 357 NLRB 2047, 2055; *Evergreen America Corp*., 348 NLRB at 181. ("The coercive and lasting effect of the Respondent's unlawful conduct was magnified by the fact that many of the violations were committed by high management officials, a point that has consistently been emphasized by the Board as supporting the issuance of a bargaining order").

In this regard, the threats at issue here were particularly coercive: Ellis' emphasized his high rank, status, and power over Terex, expressly declaring that he personally was the individual who decided whether or not the facility would receive work or

[69] I reject the Respondent's contention that "[i]t is also reasonable to assume that Kossow told the other employees whose cards he solicited the same things that he told Grife and Stuber." To the contrary, Kossow testified extensively about his solicitation activities and there is nothing even remotely problematic about his statements with regard to the other cards he solicited. They were adequately authenticated and demonstrate support for the Union.

[70] In *Wallace*, supra at 29, although the Board recognized that the employer's unfair labor practices were "likely to have a pervasive and lasting deleterious effect on the employee's exercise of Section 7 rights," the Board declined to consider a bargaining order remedy because it recognized that, "given the long and unjustified delay of the case here at the Board" a bargaining order "would likely be unenforceable" in the court of appeals. No such factors are present in the instant cases.

whether work would be moved to another facility. Ellis' declaration of his control over work, which Ellis admitted making, was recalled by nine other witnesses, management and employee. It clearly was not and is not likely to be forgotten. In a speech filled with implicit and thinly veiled threats, it clearly heightened (and, as an aside, was clearly intended to heighten) the coercive tendencies of Ellis' speech. This is all consistent with the Board's understanding that "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *Michael's Painting, Inc.,* 337 NLRB 860, 861 (2002), enfd. 85 Fed. Appx. 614 (9th Cir. 2003).

In addition, there is the unlawful termination of the painters and the weld/fab employees. Although these terminations occurred after the assembly election, and in bargaining units other than the assembly unit, it is entirely appropriate to consider these terminations in evaluating the *Gissel* order. *California Gas Transport*, 347 NLRB 1314, 1325 (2006) ("the Respondent's unfair labor practices directed against nonunit El Paso-based drivers are inextricably linked with its unfair labor practices against the Nogales-based drivers, and therefore provide support for a Gissel bargaining order at Nogales"); *Holly Farms Corp*., 311 NLRB 273, 282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. granted on different issue (and decision affirmed), 517 U.S. 392 (1996); *M.J. Metal Products, Inc*., 328 NLRB 1184, 1185 (1999) ("an employer's continuing hostility toward employee rights in its postelection conduct evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort") (internal quotations omitted).

In this case, the terminations, albeit in a different bargaining unit, were at the same facility, where labor relations is operated centrally for the entire facility, and the employer's anti-union campaign—and in many ways the union's campaign—was run plant-wide. And it is not just that the assemblers would be well aware of the terminations of the painters and assemblers. In this case, the assemblers were specifically told by DiBiagio on June 24, as part of the Respondent's campaign against the union, and while he knew that the painters were going to be terminated in 2 days, to "watch[ ] to see what happens with the Paint Department. You can sit back and watch in real life what happens to employees who vote for the Union." DiBiagio told the assemblers that if they voted no, they could always have another election in 12 months and "That way, you get the benefit of seeing a real life example play out before having to make a decision[.] This way you take none of the risk[.]"

These admonitions served to reinforce, in a particularly chilling manner, the coerciveness of the terminations in the memories of the assembly employees. If these warnings were not understood at the time they were given, they were certainly perceived after the assembly unit election as evidence of "what happens to employees who vote for the Union." While the termination decision did not affect the assembly employees' vote, the terminations and their fulfillment of the pre-election admonitions by DiBiagio that the assembly employees "watch[ ] what happens to employees who vote for the Union" certainly serve to undermine the chances that a new election will fairly reflect noncoerced employee sentiment.

I note that this conjunction of the warning to watch "what happens to employees who vote for the Union" with their termination 2 days later provides a powerful and, indeed, unforgettable object lesson to employees in the risks of voting for union representation. This is true quite apart from what DiBiagio claims he meant by the comments and even apart from the Respondent's claims about the motives for the terminations. Objectively, no reasonable employee would doubt the connection and the uniquely powerful demonstration of the risks of voting for the Union.

The Respondent's objections to a Gissel order are not compelling. It argues that the hallmark violations include many threats that were implicit rather than explicit. But this case provides a good example where the thinly-veiled nature of the top officials' threats could not reasonably be thought to have diminished their coercive force. As a matter of deference to Supreme Court precedent, agency expertise, and even common sense, it would be unsound to ignore the Supreme Court recognition that employees "pick up intended implications [of their employer's comments] that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 580. I doubt that any in the crowd missed the import of DiBiagio and Ellis' threats. And on the off chance they did, Ellis' threats were explicitly reinforced by certain individual supervisors who took to the assembly shop floor to warn employees that unionization could lead to plant closure. Further, as discussed, DiBiagio's admonitions to "watch[ ] what happens to employees who vote for the Union" were dramatically impressed upon employees when 2 days later he ordered the first terminations of rank-and-file employees at the plant since his arrival at Terex.

The Respondent argues that in recent years the Board is more circumspect in issuing Gissel bargaining orders. However, the standard has not changed, and the long list of cases it cites in which bargaining orders have not been imposed by the Board simply demonstrates what is and should be the case: bargaining orders are not perfunctorily imposed. However, the cases cited by the Respondent in which bargaining orders were not deemed necessary are distinguishable: none involved multiple meetings of the entire work force in which threats of plant closing and job loss were made by the not only the highest ranking employer official of the facility, but also by his boss who came to the facility for the purpose of making his threat-laden speech to the employees. And none of the cases cited by the Respondent involved, in the wake of such threats and immediately after the election, the unlawful termination of employees in circumstances where the employees had been directed to "watch[ ] what happens to employees who vote for the Union."

There is, of course, a certain sui generis quality to each case, and the Board must use its best judgment on as to which remedies effectuate the purposes of the Act. See *High Point Construction Group,* 342 NLRB 406, 407 (2004) ("Although the appropriateness of a bargaining order depends on the nature and extent of the Respondent's misconduct, there are no mechanical or per se rules. Each case must be fully examined for the 'infinitely various circumstances which will influence employee perceptions of such prohibited conduct.'" (quoting *General*

Stencils, 195 1109, 1112 (1972) (Chairman Miller, dissenting)), enf'd. 135 Fed. Appx. 598 (4th Cir. 1995). But none of the cases cited by the Respondent match the purposeful assault on the bargaining unit's free electoral choice that is found in the instant case.[71]

In opposition, to a bargaining order, the Respondent relies on a number of events and actions occurring after the violations at issue. The Respondent argues that a bargaining order is unnecessary because, in October 2014, after issuance of the complaint by the General Counsel, Ellis sent a letter to all employees providing his "emphatic assurances" that Terex will respect their rights.[72] Later that month, in an October 13 town hall meeting, DiBiagio made assurances similar to those given by Ellis in his letter. The Respondent also points to the on-going bargaining with the painters unit after the Union's certification. This bargaining has occurred without resolution but without any allegations by the General Counsel of unfair labor practices, thus providing "a continuing [union] presence in the facility and employees can readily see the results of collective bargaining." (R. Br. at 139.)

To be clear, Ellis' October 2014 letter, DiBiagio's meeting comments, and the bargaining with the painters unit, do not, the Respondent admits (Tr. 587, 1628) amount to repudiation of any of the unfair labor practices. Timely repudiation was an option that the Respondent could have but failed to pursue (see, *Passavant Memorial Area Hospital*, 237 NLRB 138-139 (1978)). In any event, the Board "evaluate[s] the appropriateness of a Gissel bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations are generally not considered." *Milum Textile Services,* 357 NLRB 2047, 2056; *Evergreen America Corp*., 348 NLRB at 182.

Finally, the Respondent argues that the loss of majority support reflected in the election results could have occurred before the Respondent embarked on its unlawful campaign of threats against employees on June 19, and, therefore, there should be no presumption that the loss of majority support was a result of unlawful conduct by the Respondent. The Respondent notes that the Union collected 20 of its cards between February 28 and April 5, before the start of the Respondent's antiunion campaign and over 2 months before the Respondent's preelection unfair labor practices. The Respondent points out that the unlawful threats against employees are not alleged to have commenced until June 19. From April through June 19, its antiunion campaign was lawfully conducted. Thus, reasons the Respondent, the Union might have lost its majority support as of June 18, based on the Respondent's lawful antiunion campaign.

This uncertainty exists, but it is a problem of the Respondent's making. The Respondent's significant unfair labor practices have rendered the election an untrustworthy indication of employee sentiment. The employees were entitled to an election free from such conduct. The Respondent's unfair labor practices deprived them of that. The issue of a Gissel bargaining order arises because of the contention that the chances of a fair rerun election are slight in light of the employer's significant unfair labor practices, unfair labor practices that "have the tendency to undermine majority strength and impede the election process." *Gissel*, 395 U.S. at 614.

As established by the Supreme Court, it is the General Counsel's burden to prove only that majority support once existed. The General Counsel has proven that here. It is not the General Counsel's burden to prove that, in fact, the demonstrated loss of majority support by the time of the election was necessarily the result of the employer's unfair labor practices. As the Respondent points out, it might not be so. And then again, it might well be. It is well recognized that uncertainty in this regard must be borne by the wrongdoer. *Bigelo v. RKO Radio Pictures*, 327 U.S. 251 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"). The quandary for the Board, as the Supreme Court explained in Gissel, is "that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion." 395 U.S. at 613.

In this case, in view of the violations, potently delivered by top officials on multiple occasions to the entire bargaining unit, at the most coercive time: right before the election—and then

[71] The cases relied upon by the Respondent in which no bargaining order issued include *Desert Toyota*, 346 NLRB 118 (2005) (with exception of unlawful no-solicitation, none of the unfair labor practices occurred on a unit-wide basis, only two employees directly affected by them and no evidence of dissemination); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1121 (2004) (where the Board noted "the large size of the unit, approximately 400 employees, as a factor long-recognized by the Board as diluting the impact of even the most serious unfair labor practices"); *Desert Aggregates*, 340 NLRB 289, 294 (2003) (unlawful layoff of two employees was mitigated by the fact that layoffs were temporary and employer attempted to recall both employees when business improved, contrasting with case where Gissel order issued where employer did not attempt to reinstate discriminatorily discharged employees); *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003) (no threats of plant closure, and with exception of unlawful no-solicitation rule virtually all unfair labor practices occurred in one-one-one situations, did not affect significant portion of bargaining unit, and were not disseminated); *Wake Electric Membership Corp.*, 338 NLRB 298, 301–302 (2002) (no "typical 'hallmark' violations" such as discharges or threats of plant closing; threats to discharge were made to individual employees by a supervisor, not in speech to a large group); *Aqua Cool,* 332 NLRB 95, 97 (2000) (only "hallmark" violation was one isolated threat of plant closure directed at one employee); *Yoshi's Japanese Restaurant, Inc.,* 330 NLRB 1339, 1346 (2000) (threats of closure made to three employees and not widely disseminated).

[72] Ellis' letter stated that Terex "will not close, or threaten to close, the Grand Rapids facility, or any other facility, because team members engage in union activity or select a union to represent them." The letter went on to state that "[a]ll business decisions regarding any facility will be based solely upon lawful economic and business considerations." The letter made similar statements about Terex not moving or withholding work because of union activities, and affirmed that "Terex respects the right of team members to choose in a secret ballot election whether or not to be represented by a union" and would "bargain in good faith with any union that is selected by Terex team members in a lawful secret ballot election."

followed up with terminations that reinforced to employees the risk of unionizing, I find that that the possibility of erasing the effects of these unfair labor practices and conducting a fair rerun election are slight. Simply requiring the Respondent to refrain from unlawful conduct will not eradicate the lingering effect of these violations and will not deter recurrence. I find that, on balance, employees' representational desires will be better protected by a bargaining order than by traditional remedies. Accordingly, the Respondent's obligation to bargain with the Union as the exclusive representative of its assembly employees unit commenced June 19, 2014, when it embarked on a clear course of unlawful conduct toward the assembly employees. *Naum Brothers*, 240 NLRB 311, 311–312 (1979), enfd. 637 F.2d 589 (6th Cir. 1981); *Peaker Run Coal Co*., 228 NLRB 93 (1977).

OBJECTIONS TO CONDUCT AFFECTING THE ELECTION

As stated above, in Case 18–RC–128308, the Regional Director directed a hearing on Union's Objections 1, 3, and 8. These objections were as follows:

> 1. During the critical period, the Employer engaged in illegal interrogation of the employees.
> 3. During the critical period, the Employer illegally threatened to close the plant if the Union was successful in the representation election and made other unlawful threats using intimidating and profane language.
> 8. During the critical period, the Employer made statements indicating an anti-union animus.

These objections are broadly written and parallel and/or overlap with evidence offered by the General Counsel and the Union in support of the unfair labor practice complaint allegations in the consolidated hearing. The Regional Director's Report and Order directing a hearing on the objections did not specify any of the alleged facts surrounding the objections or otherwise clarify the extent, if any, to which the objections involve alleged conduct by the Respondent different than that alleged to be unfair labor practices. In its brief, the Union makes passing reference to claims of objections beyond the unfair labor practice allegations (Union Br. at 50) but does not develop an argument regarding specific objectionable conduct different from that alleged to be unfair labor practices.

The independent section 8(a)(1) violations I have found that were directed towards the assembly employees unit occurred during the critical period, specifically in the week before the June 25 election. They are encompassed by the objections. Conduct which violates the Act is, a fortiori, conduct which interferes with an election unless it is so de minimis that it is virtually impossible to conclude that the violation could have affected the results of the election. *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962). The unfair labor practices found above are not, in any sense, de minimis, or isolated. These threats of job loss and plant closure were made to the entire unit, on more than one occasion, by top officials of the employer. The threats were reiterated to a number of individuals by two lower-level supervisors. These unfair labor practices would reasonably tend to interfere with employees' freedom of choice. The Board has long held that it will set aside an election where one party engages in conduct which could have the reasonable effect of destroying the "laboratory conditions" necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *General Shoe Corp.,* 77 NLRB 124, 127 (1948). Accordingly, I shall sustain the Union's Objections to the extent coextensive with the 8(a)(1) violations that I have found occurred during the critical period, and on that basis I recommend setting aside the election. *DTR Industries*, 311 NLRB 833, 837–838 (1993), enf't. denied on other grounds, 39 F.3d 106 (6th Cir. 1994).

I do not reach the issue of whether there is additional objectionable conduct, including the issue of whether any such objectionable conduct was adequately identified or fully and fairly litigated.

Conclusions of Law

1. The Respondent A.S.V. Inc. a/k/a TEREX is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the designated collective-bargaining representative of the following bargaining units of the Respondent's employees:

(assembly unit)

> All full-time and regular part-time assemblers employed by the Employer at its Grand Rapids, Minnesota facility, including team leads; excluding all other employees, temporary employees, managers, guards and supervisors as defined in the Act, as amended

(painters unit)

> All full-time and regular part-time employee painters and employee senior painters who are in the Paint Department, including team leads within the Paint Department; excluding all other employees, temporary employees, managers, and guards and supervisors, as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act, on or about June 19, 2014, through General Manager James DiBiagio, by threatening employees that because employees in the painters unit had selected the Union, they had caused damage to the Respondent; by threatening employees that the Grand Rapids' facility could or would be closed because of employee support for the Union; by threatening employees that the Respondent had closed most of its unionized factories; and by threatening employees that the Respondent did not trust employees who favored the Union and that if DiBiagio could not trust employees, they are nothing to him.

5. The Respondent violated Section 8(a)(1) of the Act, on or about June 23, 2014, through the President of Terex construction group George Ellis, by threatening employees that the future of the Grand Rapids plant was dependent on the results of the upcoming June 25 representation election; by threatening employees that Ellis could move the Respondent's facility and that he decided what work would be performed in the Grand Rapids' facility and that other facilities could perform the

Grand Rapids' work; by threatening employees that the Respondent had closed some of its facilities and moved work out of some of its facilities after those employees chose union representation; and by threatening that employees that Ellis could move work out of the Grand Rapids facility if he wanted to do so.

6. The Respondent violated Section 8(a)(1) of the Act, on or about, June 19, and again on June 23 and 24, 2014, through supervisor Nancy Dahlgren, by threatening employees in multiple conversations with separate employees or groups of employees, that the Respondent would close the Grand Rapids facility if the assembly employees voted for the Union.

7. The Respondent violated Section 8(a)(1)of the Act, on or about June 19, 2014, through supervisor Nancy Dahlgren, by questioning an employee about his views of a meeting conducted by General Manager DiBiagio, at which the chief subject was the Respondent's opposition to the Union.

8. The Respondent violated Section 8(a)(1) of the Act, on or about June 23, and 24, 2014, through supervisor Buck Storlie, by threatening employees that the Respondent would close the plant if the employees voted for the Union.

9. The Respondent violated Section 8(a)(1) of the Act, on or about June 26, 2014, through manager Joan Hoeschen, by threatening an employee with unspecified retaliation because the employee voted for the Union.

10. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about June 26, 2014, by terminating employees Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, and Rory Sisco, and violated Section 8(a)(3) and (1) of the Act on or about August 14, 2014, by terminating employees Rick Andrews, Kerry Esler, and Lee Kostal, because of the Respondent's employees' union activities and support and to discourage employees from engaging in these activities.

11. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. The unfair labor practices committed by the Respondent between June 19 and 24, 2014, constitute objectionable conduct warranting the setting aside of the election in Case 18–RC–128308.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act

The Respondent, having unlawfully terminated and/or permanently laid off employees Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, and Rory Sisco on June 26, 2014, and having unlawfully terminated and/or permanently laid off employees Rick Andrews, Kerry Esler, and Lee Kostal, on August 14, 2014, must offer these employees full reinstatement to their former jobs, or if those jobs no longer exist, to equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall make these employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions. The backpay due shall be computed as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall remove from its files, including the terminated employees' personnel files, any reference to the termination and/or permanent layoff of these employees, and shall thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. The Respondent shall compensate the above-named employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

For the reasons set forth above, the election in Case 18–RC–128308 shall be set aside. The remedy for the unfair labor practice violations shall include an order that the Respondent shall recognize, and upon request, bargain with the Union as the exclusive representative of the assembly employees unit, and, if an understanding is reached, embody the understanding in a signed agreement.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2014. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 18 of the Board what action it will take with respect to this decision.[73]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[74]

ORDER

The Respondent A.S.V., Inc. a/k/a Terex, Grand Rapids,

[73] The complaint seeks as part of the remedy that the Respondent's officials (or a Board agent) read the notice to employees. This remedy is not requested by either the Union or the General Counsel in their posthearing brief. I consider the request to have been abandoned. In any event, given the imposition of the *Gissel* bargaining order remedy, I find that the reading of the notice is an unnecessary remedy for the Respondent's unfair labor practices.

[74] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening employees by telling them that by choosing union representation they had damaged the Respondent.

(b) Threatening employees that the Respondent would or could close the facility because of employees' support for the union or if employees voted for the union.

(c) Threatening employees by telling them that the Respondent has closed most of its unionized facilities.

(d) Threatening employees that the Respondent did not trust employees who favored the Union and that if the Respondent's general manager could not trust employees, they are nothing to him

(e) Threatening employees by telling them that the future of their facility depended on the results of the upcoming representation election.

(f) Threatening employees by telling them that the president of the Respondent's corporate affiliate decided where the facility's work was to be performed and that he would decide whether work was performed at the employees' facility or at other facilities.

(g) Threatening employees by telling them that the Respondent had closed and moved worked out of some of its facilities because the employees of those facilities chose union representation.

(h) Threatening employees by telling them that the president of the Respondent's corporate affiliate could move work out of the facility if he wanted to.

(i) Threatening employees with unspecified retaliation because they voted for the Union.

(j) Coercively interrogating employees about their views of an antiunion meeting conducted by the Respondent.

(k) Terminating and/or permanently laying off employees because of employees' union activity and to discourage union activity.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days, offer Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision in these cases.

(c) Compensate Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful terminations and/or permanent layoffs of Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, and within 3 days thereafter, notify each of them in writing that this has been done and that the terminations and/or permanent layoffs will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Recognize, and upon request, bargain with the Union as the exclusive representative of the assembly employees unit, and, if an understanding is reached, embody the understanding in a signed agreement.

(g) Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix." [75] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[75] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the election in Case 18–RC–128308 is set aside.

Dated, Washington, D.C. June 9, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that choosing union representation damages us.

WE WILL NOT threaten you that we would or could close the facility because of your support for the Union or because you voted for the Union.

WE WILL NOT threaten you by telling you that we have closed most of our unionized facilities.

WE WILL NOT threaten you by telling you that we do not trust employees who favor the Union and that if our general manager cannot trust employees, they are nothing to him.

WE WILL NOT threaten you by telling you that the future of your facility depends on the results of a union representation election.

WE WILL NOT threaten you by telling you that the president of the employer's corporate affiliate decides whether the work is performed at this or at another of our facilities.

WE WILL NOT threaten you by telling you that we have closed or moved work out of some of our facilities because the employees in those facilities chose union representation.

WE WILL NOT threaten you by telling you that the president of the employer's corporate affiliate can move work out of your facility if he wants to do so.

WE WILL NOT threaten you with unspecified retaliation because you voted for the Union.

WE WILL NOT interrogate you about your views of meetings we conduct concerning the Union.

WE WILL NOT terminate and/or permanently lay off employees because of your union activity or to discourage union activity.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL compensate Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to the unlawful terminations and/or permanent layoffs of Dennis Feltus, Dale Persson, Jesse Schminski, James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, Rory Sisco, Rick Andrews, Kerry Esler, and Lee Kostal, and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL recognize, and upon request, bargain with the Union as the exclusive representative of the assembler employees unit, and, if an understanding is reached, embody the understanding in a signed agreement.

A.S.V., INC. A/K/A TEREX

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-131987 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.